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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 419

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT, E. C. ATKINS AND COMPANY.

KURT F. PANTZER,
FREDERIC D. ANDERSON,
LEWIS C. BOSE,
Attorneys for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.

THE BLAKISTON-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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The Respondent, E. C. Atkins and Company, respectfully submits that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered on May 31, 1946 (*Atkins*, R. 322), should be affirmed, and presents this Brief in support of that contention.

QUESTIONS PRESENTED.

In place of the single question said to be presented by the *Atkins* case in the Board's Brief, there are actually two questions:

1. Are Auxiliary Military Police of the Army of the United States "employees" of Respondent within the meaning of Section 2(3) of the National Labor Relations Act when:

(a) they never worked for Respondent in any other capacity;

(b) they were required by the Army of the United States to be enrolled to protect the plant internally and externally against *sabotage, espionage* and natural hazards, and to *serve with the Army* in time of disaster, internal disorders, *enemy action by air raid, fifth column activity, paratroop attack or invasion;*

(c) they were required to wear insignia prescribed by the Army because "by wearing such insignia or marks members serving with the Army will be recognized as *legitimate troops*" (Resp. Ex. 4, *Atkins*, R. 110);

(d) they are interviewed by Respondent, but are employed only when they are inducted, after investigation and approval by the Army, and after taking an oath of allegiance to the United States, agreeing to obey the orders of duly authorized officers, hearing the Articles of War read, and subjecting themselves to military law;

(e) they continue to be members of the Auxiliary Military Police until their resignations or dismissals are approved by competent military authority; the extreme authority of Respondent being to recommend dismissal, and to suspend without pay pending action on the recommendation;

(f) they receive all of their orders and instructions from the Army, such orders and instructions being received by the Chief Guard, and communicated by him to the individual guards, or originated by that Chief Guard who acts solely on behalf of, and as a representative of, the Army, and does not represent or act on behalf of Respondent;

(g) the Army has the right to exercise, and did exercise, complete control and direction over the manner and means in which they perform their duties; and over their hours of work, discipline, promotion, and other conditions of employment;

(h) they are paid by checks of Respondent, which pays them because it is required to do so by the government.

2. If, under the facts set forth in question 1, such Auxiliary Military Police are "employees," was it, in December, 1943, inimical to the public welfare to require Respondent to bargain collectively with the representative of the majority of such Auxiliary Military Police with respect to rates of pay, wages, hours, and other conditions of employment?

The Brief of the Board states the sole question to be as follows:

> "The question presented by the *Atkins* case is whether persons who are employed to guard the property of a private employer, who are compensated by that private employer at rates fixed by him, and who are also civilian auxiliaries to the military police of the Army of the United States, are 'employees' within the meaning of Section 2(3) of the National Labor Relations Act."

The statements of fact contained in the question presented by the Board in its Brief are not supported by the evidence. The evidence requires a finding that the facts were as stated in the first of the two questions correctly stated above.

The three chief errors in the Board's version of the question are (a) the statement that these persons "are employed to guard the property of a private employer"; (b) the statement that they "are *also* civilian auxiliaries to the military police of the Army of the United States"; and (c) the omission of most of the important facts.

The fundamental error in those two statements is one which has blinded the Board throughout the proceeding. It is a failure to understand the origin of the Auxiliary Military Police at the Respondent's plants and their mission and purpose. The Board assumes in its Brief that these guards had been employees (not militarized) of Respondent; that as such they were "employees" within the meaning of Section 2(3) of the Act; that militarization was a status superimposed upon an existing employee relationship; and that the question is whether the addition of militarization deprives such guards of their pre-existing status as "employees."

There is no foundation in the evidence for this erroneous assumption. Yet the entire Brief is founded upon it; and it is only this error which explains the Board's effort to join the *Atkins* and *Jones & Laughlin* cases as though they were similar in their facts.

The Board in its Brief has completely ignored the second question in this case, although there were two grounds for the judgment of the Seventh Circuit Court of Appeals. These were stated by that Court in its second opinion as follows:

> (1) "We formerly refused to enforce the Board's order on the ground that, since the alleged employees (plant guards) were militarized, they were not employees of respondent within the meaning of § 2(3) of the National Labor Relations Act."
>
> (2) "Alternatively, we held that even if the guards, despite their militarized status, be considered em-

ployees of respondent, enforcement of the Board's order 'should not be allowed * * * (because) to do so would be or is likely to be inimical to the public welfare.' (*Atkins*, R. 321.)

As to the first ground, the Court said:

> "We have also given this matter further consideration and are of the opinion that our former decision in this respect was correct, and we reaffirm it. (*Atkins*, R. 321.)

As to the second, the Court said:

> "there is no necessity for decision on our part in this respect. This is so for the reason that the latter issue is immaterial in view of our decision that the plant guards were not employees." (*Atkins*, R. 321.)

But the judgment of the Court, on May 31, 1946, was expressed as follows:

> "On consideration whereof, it is ordered and adjudged by this Court that the former judgment of this Court in this matter be reinstated for the *reasons* stated in our former opinion, filed February 27, 1945, and that the Board's motion for enforcement of its order be again denied." (*Atkins*, R. 322. Emphasis supplied.)

STATEMENT.

Following the usual procedure under Section 9(c) of the Act, the Board issued a Decision and Direction of Election finding that the plant guards involved were "employees" within the meaning of the Act, that they constituted an appropriate bargaining unit, and that they were entitled to the collective bargaining rights guaranteed by the Act, despite the fact that they were Auxiliary Military Police. (*Atkins*, R. 5-8.) The petitioning union was selected by a majority in the election and was certified by the Board as the representative of the Auxiliary Military Police. (*Atkins*, R. 17.)

Thereafter, in proceedings under Section 10(c) of the Act, the Board issued a Decision and Order in which it found that the Respondent had refused to bargain collectively with the certified representative of the Auxiliary Military Police thereby engaging in unfair labor practices within the meaning of Section 8(5) and (1) of the Act. (*Atkins*, R. 30-33.) The Board ordered Respondent to cease and desist from refusing to bargain with the Union; to cease and desist from engaging in any like or related acts or conduct interfering with, restraining or coercing the employees; upon request to bargain collectively with the Union; and to post appropriate notices. (*Atkins*, R. 32-33.)

The evidence relating to the Board's finding that these Auxiliary Military Police were "employees" within the meaning of Section 2(3) of the Act and entitled to exercise the bargaining rights guaranteed by the Act may be summarized as follows:

In December 1943, when its refusal to bargain occurred

(*Atkins*, R. 39), Respondent was engaged in the manufacture of saws, tools and armor plate at its so-called "main plant" in Indianapolis, Indiana, and of armor plate at the Fall Creek Ordnance Plant also in Indianapolis, Indiana. (*Atkins*, R. 277.) The main plant was owned by Respondent and its products were sold to jobbers, dealers, subcontractors and the United States Government. (*Atkins*, R. 227.) It was designated as a restricted area under government supervision. (*Atkins*, R. 86.) The Fall Creek Ordnance Plant was owned by the United States Government and operated by Respondent. It was treated by the Army as a military reserve. (*Atkins*, R. 86.) All armor plate was manufactured for the United States Government. (*Atkins*, R. 88, 277; *Atkins*, Stip. p. 3.)

Before Respondent began to produce armor plate it had no plant guard force, although it did have four watchmen at the Main Plant who occupied pensioners' jobs and were employees of Respondent.[1] (*Atkins*, R. 88; *Atkins*, Stip. p. 2.) When Respondent entered upon war production the Army required that an Auxiliary Military Police Force be established with a strength of sixty-four members covering both plants.[2] Except for the four men who

[1] Testimony of C. E. Wood, Respondent's Personnel Director:

"Q. Before the Atkins company became engaged in defense work, will you kindly state how many watchmen were employed as employees by the Atkins company?

A. It varied from four to six. We had two night watchmen on patrol called clock men—made the rounds regularly through the plant and pulled the 82 boxes. The night clocks.

Q. You had four day men?

A. No; two day men at the gates. Frankly, they were, at that time that was a pensioner's job." (*Atkins*, R. 88.)

[2] Testimony of C. E. Wood, Respondent's Personnel Director:

"A. At the beginning of our participation in the production of war materials; namely, armor plate, representatives from the Cincinnati office came into our plant and made a survey and gave us a recommendation of the requirements of the Government inso-

had occupied pensioners' jobs as watchmen, none of the Auxiliary Military Police had ever been employed by Respondent before they became such Auxiliary Military Police.

The War Department described the purpose of the Auxiliary Military Police as follows:

> "The purpose of organizing the plant guard force is to increase the authority, efficiency, and responsibility of the guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States *to supplement the Army* in wartime emergency situations." (Resp. Ex. 4, *Atkins*, R. 105-106, Emphasis supplied.)

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far as plant production would be considered and that was submitted in writing and complied with.

Q. When you say the Cincinnati office, you mean the Cincinnati Ordnance Office?

A. Ordnance Office.

Q. Are most of your contracts with the Ordnance Department?

A. We have had dealings in the past and have complied with the recommendations of both the army and navy. The major part of our control was of the army and at this time is practically all controlled by army interests.

Q. Was it the Ordnance Department that insisted upon your switching over from a watchman basis to an Auxiliary Military Police basis or was it the Military Police?

A. It was the army representatives from the Ordnance Department of Cincinnati, out of Col. Rasmussen's office that required it.

Q. As a result of that insistence the Auxiliary Military Police were employed?

A. That is correct.

Q. State whether or not, Mr. Witness, the Atkins company could retain any of its war contracts if it did not submit to the system of Auxiliary Military Police that is now in force at the plants?

A. It is understood and the majority of the contracts submitted, you will find the clause stating that unless proper protection of Government property is provided in compliance with certain directives, that will be issued from time to time, some of these special contracts will be or might be cancelled and fact of the matter is would be if we did not comply with the interests." (*Atkins*, R. 88-89.)

It described their mission in these terms:

"6. The mission of a guard force of Auxiliary Military Police is:

(a) To provide interior and exterior protection of the plant against *sabotage* and *espionage* and natural hazards.

(b) To *serve with the Army* in providing the protection to the plant and its environs in emergency situations.

7. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; *protection from air raid; Fifth Column activity; paratroop attack or invasion;* or it may arise from any other condition or circumstances involving the plant or its community." (Resp. Ex. 4, *Atkins*, R. 106, Emphasis supplied.)

Applicants were enrolled in the Auxiliary Military Police as follows: They filled out application forms in Respondent's personnel office, which receives these forms on behalf of the Army.[3] (*Atkins*, R. 54, 68, 91.) These

[3] Testimony of C. E. Wood, Respondent's Personnel Director:

"Q. When a person applies for employment as an Auxiliary Military Policeman, where does he fill out the application from which Employer's Exhibit No. 5 is taken? Is that done in your office?

A. Yes, sir.

Q. Your office both in the main plant and the Fall Creek plant?

A. Yes.

Q. Do you have the authority to accept that application for the military authorities?

A. I can accept that only subject to the approval or disapproval of the Cincinnati office. We select or rather we interview and select prospective guards. Those men are in turn, their names are submitted to the Cincinnati office along with the proper papers that are provided by the Government for them to fill out. By their approval they are permanently inducted into the Military Police

were submitted with the recommendation of Respondent to the Army. (*Atkins*, R. 92.) The Army made an independent investigation of the applicants and enrolled them only if it approved them. (*Atkins;* R. 68, 71, 92.) This was in accordance with the applicable War Department regulation:

> "A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." (Resp. Ex. 4, *Atkins*, R. 109.)

At the time a guard was enrolled, he was required by the Army to make, in writing and orally, an oath of allegiance to the Constitution, and to make a written agreement with the United States to obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers, and an acknowledgment that the appropriate Articles of War had been read and explained to him and that he was subject to military law. (Resp. Ex. 2, *Atkins*, R. 103-104, 54, 56 and 57.) This was

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group, or upon their rejection, they would be given their dismissal papers.

Q. When you say you select them, as a matter of fact, all you do is just to recommend the man to them?

A. I interview, but recommend them.

Q. When they have been recommended, do you know whether or not the military authorities make an independent investigation as to the capacity, integrity, and patriotism of the man whom you have recommended?

A. In the past two years, it has come to my attention, for no statement has been made, that they do, but the report has come back which made it necessary to remove a man on the force.

Q. Is that so that you are satisfied that an independent investigation is made?

A. That's correct.

Q. In addition to what you have learned in the court room today from Chief Johnston?

A. Yes." (*Atkins*, R. 91-92.)

required by the Army regulations. (Resp. Ex. 4, *Atkins*, R. 105.)

Each guard was issued an Auxiliary Military Police identification card by the Army (Resp. Ex. 3, *Atkins*, R, 104, 55, 69) which was not carried by Respondent's employees. (*Atkins*, R. 91.)

Auxiliary Military Police were ruled by the Army to be particularly subject to the following Articles of War: Articles 58 (desertion), 61 (absence without leave), 62 (disrespect toward the President, Vice President, Congress, Secretary of War, Governors and Legislatures), 63 (disrespect toward superior officers), 63 (assaulting or wilfully disobeying superior officer), 66 (mutiny or sedition), 68 (quarrels, frays and disorders), 69-74 (arrest and confinement), 76 (subordinates compelling commander to surrender), 81 (relieving, corresponding with or aiding the enemy), 82 (spies), 83 (military property), 85 (drunk on duty), 88 (intimidation of persons bringing provisions), 89 (good order to be maintained and wrongs redressed), 90 (provoking speeches or gestures), 92 (murder and rape), 93 (various crimes), 94 (frauds against the government), 96 (general article), 104 (disciplinary powers of commanding officers), and 105 (redress of injuries to property). These are specified in the Army regulations (Resp. Ex. 4, *Atkins*, R. 106) and appear verbatim in the Record. (Resp. Ex. 9, *Atkins*, R. 117-155.)

Only the Army could terminate the tenure of a member of the Auxiliary Military Police. The authority of Respondent was limited to suspension pending action on a recommendation of dismissal.

> "25. A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant

guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police." (Resp. Ex. 4, *Atkins*, R. 109.)

This was so in practice as well as in the regulations as is shown in the following testimony of Chief of Guards Johnston:

"Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Company or the Military?

A. The military discharges him from the Auxiliary Military Police. Now there is one thing that should be said there. He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty; he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company." (*Atkins*, R. 72.)

Q. Do you have the right to recommend him for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. Do you have the right to recommend them for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging.

Trial Examiner Shroyer: Who issues these two different types of terminations?

The Witness: He does; he issues those." (*Atkins*, R. 81.) (See also *Atkins*, R. 84, 89.)

The Army regulations provided some authority to plant management as to hiring and firing, where there

was *a pre-existing plant guard force, which was not the case at Respondent's plant*:

> "24. Basically the militarization of the plant guard forces does not change the *existing* systems of hiring, compensation, and dismissal *except as stated in paragraph 25.* All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private employer may, *as heretofore*, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary." (Resp. Ex. 4, *Atkins*, R. 109, Emphasis supplied.)[4]

Of course, paragraph 24 does not apply to Respondent, for Respondent had no plant guard force before the Army installed Auxiliary Military Police, so there was no "existing system" and there was no precedent for dismissing "as heretofore".

Respondent paid the wages of the Auxiliary Military Police (*Atkins*, R. 82, 85) because "the Government makes them pay" (*Atkins*, R. 82) and made the necessary payroll deductions. (*Atkins*, R. 85.) There is no other evidence about where the ultimate burden of that payment

[4] Note that this is expressly limited by paragraph 25, which reads:

"25. 'A member of the Auxiliary Military Police *may not be employed, dismissed, or may not resign* if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guards enrollment as a member of the Auxiliary Military Police. This will usually be done on the management's recommendation unless an emergency requires the guards retention." (Resp. Ex. 4, *Atkins*, R. 109, Emphasis supplied.)

fell. Respondent's counsel stated in argument before the Board "we do not operate on a cost-plus basis?" (*Atkins*, R. 333.) But in that same argument he stated:

> "when you realize that the company is merely a conduit of that pay, made to pay it as a result of the contracts of the government, contracts which it was impossible to introduce in evidence because of the confidential nature of the product covered thereby; it will be seen that it is merely a technical incident and that in substance it is the government which is the paymaster of these troops." (*Atkins*, R. 332.)

The Army regulations contained the following provision, which obviously referred to plant guard forces which had not originated as Auxiliary Military Police, and which therefore did not apply to this case:

> "27. The status of the employer in regard to the employee benefits for the guard force *is not changed.* For example, Social Security, Workmen's Compensation, Employer's Liability and vacation schedules *remain* unaffected. Employers should have a clear understanding with their insurance companies concerned." (Resp. Ex. 4, *Atkins*, R. 110, emphasis supplied.)

These same Army regulations said:

> "36. *The Auxiliary Military Police are agents of the Federal Government* and will not be subject to any state or municipal requirement which conflicts with their war time duties." (Resp. Ex. 4, *Atkins*, R. 111, emphasis supplied.)

The Auxiliary Military Police were armed (*Atkins*, R. 78) as they were required by the regulations to be. (Resp. Ex. 4, *Atkins*, R. 110.) They were required to wear distinctive insignia because:

> "By wearing such insignia or marks, members, serving with the Army, *will be recognized as legitimate troops* and not deemed irregulars or guerillas." (Resp. Ex. 4, *Atkins*, R. 110, emphasis supplied.)

They were authorized to wear service stripes which "will be in accordance with Army Regulations" (Resp. Ex. 4, *Atkins*, R. 110) and "such decorations, service medals, ribbons, and badges as are authorized for wear on the United States Army service uniform." (Resp. Ex. 4, *Atkins*, R. 110.)

It is uncontradicted in the evidence that the Army had the right to exercise, and did exercise, complete control and direction over the manner and means in which the Auxiliary Military Police performed their duties. This was done through Captain Wetenhall, the Fifth Service Command, District Plant Guard Officer, Lieutenant Scanlon, his assistant, and Chief Johnston, of the Auxiliary Military Police.

Chief Johnston had never been an employee of Respondent. (*Atkins*, R. 68.) He was enrolled directly in the Auxiliary Military Police (*Atkins*, R. 68) as Chief (*Atkins*, R. 71).

The Auxiliary Military Police Chief received his orders from the Army (*Atkins*, R. 73, 83), was inspected by them, and could be removed from his authority by the army. (*Atkins*, R. 82.) He received no orders or instructions from Respondent and was not responsible or answerable to Respondent. (*Atkins*, R. 75, 78, 80, 82.)

> "Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?
>
> A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—
>
> Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?
>
> A. They would—that would be their orders—to follow mine; yes, sir." (*Atkins*, R. 78.)

Chief Johnston worked "very closely" with Respondent's personnel director and testified that "I try to cooperate to the best of my ability and he does the same for me" (*Atkins*, R. 78) but he had never taken an order from the personnel director. (*Atkins*, R. 75.)

Chief Johnston, on his own authority, rotated the shifts of the Auxiliary Military Police, contrary to Respondent's system. (*Atkins*, R. 78-79.) He promoted members of Auxiliary Military Police to the rank of lieutenant without prior consultation, upon his own final authority, later notifying Respondent of their new rank. (*Atkins*, R. 82.)

Auxiliary Military Police were required to salute all Army officers. (Resp. Ex. 11, *Atkins*, R. 157.) This was enforced, and a guard was reprimanded by Captain Wetenhall for failure to salute him. (*Atkins*, R. 75.)

The *evidence* contains nothing directly on the subject of collective bargaining rights. The Board's Brief refers to a War Department circular which is printed in Appendix B of that Brief and which contains the statement "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." This circular is not part of the record in this case, and there is nothing to indicate that either Respondent or the Auxiliary Military Police themselves had ever heard of it. The Board's failure to introduce it in evidence or refer to it in its decisions indicates that the Board had never heard of it either.

This same circular says:

> "The Auxiliary Military Police, *as agents of the Federal Government*, will not be subject to any state or municipal requirement which conflicts with their wartime duties." (Board's Brief App. B., emphasis supplied.)

The union seeking to represent the Auxiliary Military Police was not the same union which represented the production and maintenance employees. (*Atkins*, R. 85-88.)

The Board found that the Auxiliary Military Police were "employees" of Respondent, that they were entitled to the collective bargaining rights under the Act, and that Respondent had committed an unfair labor practice, and ordered Respondent to bargain collectively with the union representing them. (*Atkins*, R. 31-32.)

The Circuit Court of Appeals for the Seventh Circuit denied the Board's petition for enforcement upon two grounds (*Atkins*, R. 348-366) which it later summarized as follows:

> 1. "We formerly refused to enforce the Board's order on the ground that, since the alleged employees (plant guards) were militarized, they were not employees of respondent within the meaning of § 2(3) of the National Labor Relations Act."
>
> 2. "Alternatively, we held that even if the guards, despite their militarized status, be considered employees of respondent, enforcement of the Board's order 'should not be allowed * * * (because) to do so would be or is likely to be inimical to the public welfare.'" (*Atkins*, R. 321.)

The Board petitioned for a writ of certiorari. (No. 1238, October Term, 1944.) In that petition the Board stated (as was not in the record) that the guards had been demilitarized and were no longer Auxiliary Military Police, but urged that this did not render the case moot. On June 4, 1945, this Court entered the following order:

> "*Per Curiam:* The petition for writs of certiorari is granted. The judgments are vacated and the cases are remanded to the respective United States Circuit Courts of Appeals for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." (325 U. S. 838.)

The Board and Respondent then entered into stipulations as to the alleged changed circumstances with respect to demilitarization. The Board filed with the Circuit Court of Appeals for the Seventh Circuit a motion for a decree enforcing its order. This was denied by that Court in the following terms:

> "We have considered the facts relative to the changed status of the plant guards by reason of their demilitarization and are of the opinion that they are irrelevant to the issues which we have heretofore decided adversely to the Board. Certainly such is the case with reference to our decision that the plant guards were not employees of respondent within the meaning of the Act. In fact, the irrelevancy of the changed circumstances as to this issue is conceded by the Board. We are urged by the Board, however, to reverse our former decision and to hold that the plant guards were employees. We have also given this matter further consideration and are of the opinion that our former decision in this respect was correct, and we reaffirm it.
>
> Although we are doubtful that the facts concerning the demilitarization of the plant guards and their changed status as a result thereof are material to our alternative holding that the enforcement of the Board's order 'would be or is likely to be inimical to the public welfare,' there is no necessity for decision on our part in this respect. This is so for the reason that the latter issue is immaterial in view of our decision that the plant guards were not employees." (*Atkins*, R. 321.)

That Court, however, reinstated its former judgment for all the reasons stated in its former opinion:

"JUDGMENT.

May 31, 1946.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board and on Motion for enforcement of decree pursuant to mandate of the Supreme Court of the United States which remanded this cause to this Court for further consideration of alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders.

On consideration whereof, it is ordered and adjudged by this Court that the former judgment of this Court in this matter be reinstated for the *reasons* stated in our former opinion, filed February 27, 1945, and that the Board's motion for enforcement of its order be again denied." (*Atkins*, R. 322. Emphasis supplied.)

ARGUMENT.

I.

Summary of Argument.

The Auxiliary Military Police were not "employees" of Respondent within the meaning of that term in the Act and, therefore, the refusal of Respondent to bargain with the Union as the representative of those Auxiliary Military Police is not an unfair labor practice under the Act. These Auxiliary Military Police were not "employees" by any meaning which might be ascribed to that term. Obviously they were not employees by common law standards since Respondent had no control over "physical conduct in the performance of the service." *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111 at 128; American Law Institute Restatement, Agency, Vol. 2, Sec. 220 (1). It is equally clear that these Auxiliary Military Police were not employees within the meaning ascribed to that term by this Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, since the relationship between Respondent and these Auxiliary Military Police, both as a matter of law and of economic fact, was not one in which there existed the mischief which the Act was designed to correct or with respect to which the ends of the Act could be attained. There was here no danger of "strikes and other forms of industrial strife or unrest" which would be "substantial obstructions to the free flow of commerce" because of the relationship of these Auxiliary Military Police to the United States Army. Because of that same relationship to the Army it was not possible to promote collective bargaining between these Auxiliary

Military Police and Respondent, nor could any inequality of the individual guard's bargaining power be remedied by protecting the freedom of organization and designation of representatives for bargaining by these Auxiliary Military Police. Respondent could not bargain with such representatives and, while it is irrelevant to this case, it may fairly be assumed that the Army would not so bargain.

An examination of the terms of the proposed Collective Bargaining Agreement submitted by the Union to Respondent (Board's Ex. 102, *Atkins*, R. 297-304), a typical instrument covering the usual subjects of collective bargaining, shows that Respondent could not effectively agree as to any of them. All were controlled by the Army, and Respondent's agreement would be empty and without effect.

The Chief of Guards, Henry A. Johnston, was a representative of the Army, and dealt with and directed the Auxiliary Military Police on behalf of the Army. He did not represent Respondent and his acts were not the acts of Respondent.

The Board has erroneously assumed that all Auxiliary Military Police fall into a "generic employee-category" which it early recognized, in which the incidents of employment and their relation to the military do not vary materially. The Board has not previously dealt with Auxiliary Military Police forces created by the Army, and so persists in assuming that this one consisted of prewar employees upon whose employee status militarization was superimposed. The Board has not previously dealt with a force of Auxiliary Military Police whose terms and conditions of employment were set and controlled by the Army. The Board's previous cases, rather, have involved only the contention that guards are representatives of management and hence within the definition of "employer" in Section 2(2) of the Act. The Board therefore has failed to appreciate the distinctive nature of this case. The Circuit Court

of Appeals' decision does not conflict with any established policy of the Board.

The Circuit Court of Appeals properly applied the rules of judicial review established by the Act and the decisions of this Court. It correctly determined that the Board's findings of fact were not supported by evidence. It held the evidence insufficient even though it considered among it a Circular No. 15 issued by Headquarters, Army Service Forces which is not part of the record, but was printed in an Addendum to the Board's Brief. It should not have considered that Circular No. 15 because it was not in evidence, was not subject to judicial notice, and was not considered by the Board in making its findings.

Even if, contrary to Respondent's contention and the Circuit Court of Appeals holding, it is held that the Auxiliary Military Police are Respondent's employees, the scope of the Board's Order is too broad because of (1) the fact, admitted by the Board, that much control rested in the Army and not Respondent and, therefore, Respondent could not bargain as to many terms and conditions of employment; (2) the excellent and harmonious collective bargaining relations of Respondent with the two unions representing its production employees; and (3) the fact that the Respondent's refusal to bargain was based solely upon its belief (shared by the Circuit Court of Appeals) that the Auxiliary Military Police were not its employees, and was not marked by any coercion or opposition to union membership or collective bargaining.

Even if the Board's Order were otherwise proper, it would conflict with the overriding National purpose of prosecuting the War. The Army kept to itself the control and determination of the terms and conditions of employment because these Auxiliary Military Police were enrolled for service with the Army during wartime. The Order of the Board, if it was not empty and futile, would

deprive the Army of this control. The jurisdiction of the Board does not extend so far.

II.

The Auxiliary Military Police Were Not "Employees" of Respondent Within the Meaning of the Act.

The National Labor Relations Act grants its benefits only to those persons who are "employees" within the meaning of that term as used therein; and it imposes obligations only upon those persons who are "employers" within the meaning of that term in the Act. Furthermore those obligations imposed upon employers exist only with respect to those persons standing in the relationship of "employee" to those employers. No employer is required to bargain collectively with persons who are the "employees" of some other "employer," and obviously not with persons who are not "employees" of any one.

Therefore the most important question in the instant case is whether the Auxiliary Military Police were "employees" of Respondent. Respondent at all times contended that they were not. The Board found in its Decision and Order that these Auxiliary Military Police were employees of Respondent. (*Atkins*, R. 32.) The United States Circuit Court of Appeals for the Seventh Circuit held directly as the majority ground of its Decision that they were not employees of Respondent within the meaning of the Act (*Atkins*, R. 364); and it reiterated this holding when the question was before it the second time (*Atkins* R. 321). The Circuit Court of Appeals held that the Board's finding that these persons were employees did not have warrant in the Record or a reasonable basis in law.

The leading decision of this Court upon the meaning of

the term "employee" in the Act is *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111. In that decision this Court pointed out that Congress did not explicitly define the term. The contention of the respondent in that case that the meaning must be determined by common law standards was rejected, whether this referred to the local state law or to some pervading general essence distilled from the state law. This Court said on the contrary that the meaning of the term was to be determined from the history, terms and purposes of the Act, and specifically by an examination of the context of the statute read in the light of the mischief to be corrected and the end to be attained.

This Court found the mischief to be corrected and the ends to be attained by the Act to be those set forth in its first section. The mischief was found to be "strikes and other forms of industrial strife or unrest" which were "substantial obstructions to the free flow of commerce." These were found to result in large measure from the refusal of employers to bargain collectively, and the inability of individual workers to bargain successively for improvements in their wages, hours, and other working conditions with employers who, themselves, were organized in the corporate or other forms of ownership association.

It was found that the purposes of the Act were (1) to encourage collective bargaining, and (2) to remedy the individual worker's inequality of bargaining power by protecting him in full freedom of association and self-organization and the designation of representatives for the purpose of negotiating the terms and conditions of employment.

It must be obvious from the facts stated herein that by common law standards these Auxiliary Military Police are not employees of Respondent. They do not satisfy any test of the employment relationship, and specifically

they do not satisfy the test of "control of physical conduct in the performance of the service" which this Court has said is the traditional test of the employee-relationship at common law. *NLRB* v. *Hearst Publications*, 322 U. S. 111, at 128, N. 27. It is not, however, useful to demonstrate this in detail in this Brief since this Court has rejected that test as the determinate to employment relationship under the Act.

It is important to apply the test of the *Hearst* case to the facts in the instant case since such application demonstrates that these Auxiliary Military Police were not employees of Respondent under the statute. The *Hearst* decision holds that the employment relationship exists if in the relationship there is a danger of strikes and other forms of industrial strife or unrest which may obstruct the free flow of commerce; and if by the encouragement of collective bargaining and the protection of the workers in self-organization and designation of representatives for bargaining, such obstructions to commerce can be eliminated.

These purposes cannot be attained unless the law and the economic facts permit effective collective bargaining between Respondent and the Auxiliary Military Police. Effective collective bargaining requires negotiation in a good faith attempt to agree upon the wages, hours, rates of pay, and other conditions of employment which are to prevail. If Respondent cannot, as a matter of law or of economic fact, make an agreement with the Union that will actually set those terms of employment, then there cannot be effective collective bargaining. Under those circumstances the mischief to be corrected by the Act would not exist; and the ends to be attained by the Act could not be attained by holding these Auxiliary Military Police to be employees of Respondent under the Act. To order such collective bargaining would be an act of futility.

The legal and economic facts of the relationship between Respondent and the Auxiliary Military Police are to be found both in the communications from the Army to Respondent and to the individual police, and in the actual practice by which the relationship among those three parties was conducted. An examination of those communications and those practices demonstrates that there was no field for collective bargaining between Respondent and the Auxiliary Military Police and that, therefore, their relationship was not one of employment to which the statute was directed. The absence of scope for collective bargaining can be demonstrated by an examination of the proposed Collective Bargaining Agreement tendered by the Union to Respondent in December 1943 as part of its demand for bargaining (*Atkins*, R. 281-282). This was received in evidence as Board's Exhibit 102, and is set forth verbatim in the Record at pages 297 to 305. This Agreement, as to the subjects covered and the general type of provision, is a typical collective bargaining agreement. If Respondent could not, as a matter of law or economic fact, enter into such an Agreement, then there is no scope for collective bargaining between Respondent and the Auxiliary Military Police.

Article I, Sections 1 and 2, of the proposed Contract contain solely a recognition by the Company of the Union and a statement of the scope of the appropriate bargaining unit. These are not subjects for bargaining.

Article I, Section 3, of Board's Exhibit 102 (*Atkins*, R. 297) contains a provision for a union shop. It requires that the Auxiliary Military Police join the Union and "as a condition of employment shall remain members in good standing in the Union." It is clear from the evidence that Respondent could not effectively make this agreement. It purports to bind Respondent to discharge any member of the Auxiliary Military Police who fails to main-

tain membership in good standing in the Union. Respondent, however, had no right to discharge any Auxiliary Military Policeman and, as a matter of practice, did not purport to exercise that right.

Only the Army could terminate the tenure of a member of the Auxiliary Military Police. The authority of Respondent was limited to suspension pending action or a recommendation of dismissal. This appears explicitly in the Orders which were received by Respondent and by the Auxiliary Military Police from the Army:

> "25. A member of the Auxiliary Military Police *may not be employed, dismissed, or may not resign* if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police." (Resp. Ex. 4, *Atkins*, R. 109. Emphasis supplied:)

This was so in practice as well as in the Regulations as appears from the testimony of the Chief of Guards, Henry A. Johnston:

> "Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Company or the Military?
>
> A. The Military discharges him from the Auxiliary Military Police. Now there is one thing that should be said there. He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty; he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company. (*Atkins*, R. 672.)
>
> Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging.

Trial Examiner Shroyer: Who issues these two different types of terminations?

The Witness: He does; he issues those." (*Atkins*, R. 81.) (See also *Atkins*, R. 84, 89.)[5]

The Army Regulations do provide some limited authority to plant managements as to discharging plant guards in situations where there was a civilian plant guard force upon which the status of militarization had been superimposed. That provision is as follows:

"24. Basically the militarization of the plant guard forces does not change the *existing* systems of hiring, compensation, and dismissal *except as stated in paragraph 25*. All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private employer may, *as heretofore*, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary." (Resp. Ex. 4, *Atkins*, R. 109. Emphasis supplied.)

Note that this provision is very much limited by paragraph 25, quoted *supra*.

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[5] As appears in Part III of this Brief, Chief Johnston was himself a member of the Auxiliary Military Police, who was enrolled by the Army, made Chief by the Army, was responsible to the Army, and acted at all times on behalf of the Army and not on behalf of Respondent. This is important to remember since the Board has cited actions by Chief Johnston, such as promotions and changes in shifts, as if they were the acts of Respondent, and as if they showed that Respondent was in practice controlling the conditions of work of the Auxiliary Military Police.

It is to be observed that Paragraph 24, just quoted, has no application to the existing case. It relates to the continuation during militarization of systems of dismissing guards in plants where such plant guards and such systems existed before militarization. As is emphasized elsewhere in this Brief, there was no plant guard force at the Respondent's plant upon which militarization was superimposed. The Auxiliary Military Police force at Respondent's plant came into existence by enrollment by the Army and was not a force composed of former employees of Respondent. The provisions of Paragraph 24, quoted above, do not grant any dismissal rights to Respondent because there was no existing system on dismissal of plant guards to be preserved by that Paragraph 24.

It, therefore, appears that the union shop agreement in Article I, of Board's Exhibit 103 (*Atkins*, R. 297), a common subject of collective bargaining, is one with respect to which Respondent cannot bargain either as a matter of law or as a matter of economic fact, because Respondent could not perform any obligation to dismiss Auxiliary Military Police who do not remain in good standing in the Union.

Articles II and III, of Board's Exhibit 103 (*Atkins*, R. 297-299), together deal with the personnel and mechanics of grievance procedure. Although the personnel designations and the particular steps in the procedure vary in the collective bargaining agreements of various employers and unions, these provisions in Articles II and III are typical grievance procedure provisions. They refer to grievances which may arise when an "employee" believes that Respondent is violating any part of the Collective Bargaining Agreement, or that the "employee" is being "unjustly or unfairly dealt with by any officer or agent of the Company." They provide that those grievances shall be taken up by the employees and certain officers

of the Union, on the one hand, and by the Auxiliary Military Police Sergeant, the Auxiliary Military Police Captain, and certain executive officers of the Respondent, on the other hand. They provide that any decision reached at any step in the procedure, in the absence of an appeal to the next step, shall be binding.

It is apparent that if Respondent entered into these two Articles of the proposed Collective Bargaining Agreement, it would be undertaking obligations which it could not enforce. It will be demonstrated elsewhere in this Brief that Respondent does not, and cannot, control the actions of the Sergeant, Captain, Chief, or other officer, however designated, of the Auxiliary Military Police. These officers are designated by, and act at the direction and on behalf of, the Army. The Respondent cannot agree that these officers would meet with representatives of the Union or enter into any negotiations with those representatives. Likewise the Respondent could not have done any of the acts which would constitute a grievance nor did the Respondent have the powers to put into effect any changes which might be awarded as the result of the proposed grievance procedure. Grievances commonly arise with respect to promotions, transfers, discipline, lay-off, or dismissal, shift assignments, and other similar conditions of employment. The average collective bargaining agreement either determines such conditions of employment or prescribes the manner and standards by which they shall be determined. A failure of the employer to observe the conditions in accordance with the methods and standards contained in the Agreement, results in a filing of a grievance, a direction that the conditions improperly established by the employer be changed, and the installation of those changes by the employer.

It is clear and undisputed in the evidence that these con-

ditions of employment are not within the control of Respondent, but rather are controlled and established by the Army through regular Army officers, or through the Chief of the Auxiliary Military Police who, as has been said, was controlled by, and acting for, the Army and not Respondent.

Chief Johnston, on his own authority, rotated the shifts of the Auxiliary Military Police, contrary to Respondent's system. (*Atkins*, R. 78-79.) He promoted members of Auxiliary Military Police to the rank of lieutenant without prior consultation, upon his own final authority, later notifying Respondent of their new rank. (*Atkins*, R. 82.) Auxiliary Military Police were required to salute all Army officers. (Resp. Ex. 11, *Atkins*, R. 157.) This was enforced, and a guard was reprimanded by Captain Wetenhall for failure to salute him. (*Atkins*, R. 75.) It has already been demonstrated that dismissal was controlled by, and was a function of, the Army, and not of the Respondent.

Discipline was a subject which the Army reserved to itself, requiring the Auxiliary Military Police to agree in writing to sign an agreement to obey orders issued by the officers of the Army and Navy, and to be subject to military. (Resp. Ex. 2, *Atkins*, R. 103.) Auxiliary Military Police were subject to the Articles of War, especially Articles 58 (desertion), 61 (absence without leave), 62 (disrespect toward the President, Vice President, Congress, Secretary of War, Governors and Legislatures), 63 (disrespect toward superior officer), 64 (assaulting or willfully disobeying superior officer), 66 (mutiny or sedition), 68 (quarrels, frays and disorders), 69-74 (arrest and confinement), 76 (subordinates compelling commander to surrender), 81 (relieving, corresponding with or aiding the enemy), 82 (spies), 83 (military property), 85 (drunk on duty), 88 (intimidation of persons bringing provisions),

89 (good order to be maintained and wrongs redressed), 90 (provoking speeches or gestures), 92 (murder and rape), 93 (various crimes), 94 (frauds against the government), 96 (general article), 104 (disciplinary powers of commanding officers), and 105 (redress of injuries to property). These are specified in the Army regulations (Resp. Ex. 4, *Atkins*, R. 108) and appear verbatim in the Record. (Resp. Ex. 9, *Atkins*, R. 117-155.)

The Respondent had no control over discipline, as appears from the following testimony of Cyrus E. Wood, Respondent's Personnel Director:

> "Q. What would you do, Mr. Witness, if one of the Auxiliary Military Police came to you and protested to any action of a disciplinary nature by Chief Johnston?
>
> A. Report that to the proper authorities, in this case to Col. Rasmussen in Cincinnati. He is the man that my office deals with when necessary.
>
> Q. You would take no jurisdiction yourself?
>
> A. No; not without instructions from Col. Rasmussen.
>
> Q. You do, whenever matters of discipline are taken up in your plant get confirmation of any instructions which Col. Rasmussen or Capt. Wetenhall sent to Chief Johnston or to Chief Hann, is that right?
>
> A. That's right." (*Atkins*, R. 90.)

It thus appears that as a matter of law and economic fact the Respondent could not bargain with respect to grievance procedure. The subject matter from which grievances arise in normal employment relationships was not within the discretion or control of the Respondent. Respondent would have been powerless to adjust any grievance which the Union might raise. The employee who had been court-martialled and dismissed by the Army, even though utterly unjust, could not obtain redress by

any grievance procedure between Respondent and the Union.

Article IV, of Board's Exhibit 102 (*Atkins*, R. 299), provides that Respondent "shall have the right to discharge, suspend or discipline any employees for cause or violation of any of the Company's posted rules or regulations." The reservation by the Army of complete control over dismissal and discipline has already been sufficiently demonstrated herein. This provision in the Collective Bargaining Agreement is futile. Article IV then provides that any employee unjustly discharged, suspended or disciplined shall have recourse to the grievance procedure and if, after investigation, it is found that he was unjustly dismissed, he shall be reinstated without loss of seniority and shall be paid for wages lost. This also is based upon the erroneous assumption that the Respondent could restore to the Auxiliary Military Police one who was dismissed or otherwise disciplined; for such dismissal or discipline would have to come from the Army; on the plain record it cannot come from Respondent.

Article V, of Board's Exhibit 102 (*Atkins*, R. 299-300), deals, according to its title, with "general working conditions." It provides that there shall be no strikes, although the Articles of War have already precluded strikes as a subject of bargaining by Auxiliary Military Police. Among the Articles of War which are specified by the War Department as being especially applicable to Auxiliary Military Police, and as defining "certain offenses punishable by court martial of which persons subject to military law may be guilty" (Resp. Ex. 4, *Atkins*, R. 108), are Articles 58 (*Atkins*, R. 138), which deals with desertion, and 61 (*Atkins*, R. 138-139), which deals with absence without leave. Respondent could not bargain with representatives of the Auxiliary Military Police on these subjects.

Article V also contains in Section 2 (*Atkins*, R. 299) an agreement by the Company that there shall be no lockout. This also is not a subject of bargaining. The Respondent was required by the Army to permit the Army to install Auxiliary Military Police in its plant. It had no power to lock them out, and therefore could not bargain with the Union on that subject.

Section 3, of Article V (*Atkins*, R. 300), provides that the Company shall furnish uniforms and equipment to the Auxiliary Military Police. This had already been required by the Army in Paragraph 29 of its Regulations for Military Police. (Resp. Ex. 4, *Atkins*, R. 110.)

Article V, Section 4 (*Atkins*, R. 300), requires guards to be in the proper uniform and to be neat in appearance. The requirement not merely that the Respondent furnish these uniforms, but that the guards wear them, is contained in the same Section 29 of Respondent's Ex. 4. (*Atkins*, R. 110.)

Section 6, of Article V (there being no Section 5) provides for the use of Bulletin Boards by the Union. (*Atkins*, R. 300.) This is hardly a "condition of employment" as to which bargaining is guaranteed even to employees under the National Labor Relations Act.

Section 7, of Article V, of Board's Exhibit 102 (*Atkins*, R. 300), provides that age shall not be a disqualifying factor in the hiring or tenure of Auxiliary Military Police. This Section is based upon the underlying assumption that the enrollment of Auxiliary Military Police is within the control of Respondent. This is clearly not so as a matter of law or as a matter of practice. The appropriate War Department Regulations relating to discharge, quoted *supra*, deal also with employment and demonstrate that control of employment rests with the Army and not with Respondent. Not merely as a matter of regulation but also as a matter of practice the enrollment was by the Army. Ap-

plicants were enrolled in the Auxiliary Military Police as follows: They filled out application forms in Respondent's personnel office, which receives these forms on behalf of the Army. (*Atkins*, R. 54, 68, 91.) These were submitted with the recommendation of Respondent to the Army. (*Atkins*, R. 92.) The Army made an independent investigation of the applicants and enrolled them only if it approved them. (*Atkins*, R. 68, 71, 92.) This was in accordance with the applicable War Department regulation:

> "A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." (Resp. Ex. 4, *Atkins*, R. 109.)

At the time a guard was enrolled, he was required by the Army to make, in writing and orally, an oath of allegience to the Constitution, and to make a written agreement with the United States to obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers, and an acknowledgment that the appropriate Articles of War had been read and explained to him and that he was subject to military law. (Resp. Ex. 2, *Atkins*, R. 103-104, 54, 56 and 57.) This was required by the Army regulations. (Resp. Ex. 4, *Atkins* R. 105.)

If the Army saw fit to impose an age limit, no agreement by Respondent such as that contained in Article V, Section 7, of the proposed Collective Bargaining Agreement (*Atkins*, R. 300) could change that economic fact.

Article VI (*Atkins*, R. 300-301) relates to seniority and provides that promotion, preference to shifts, layoffs, recall and discharge shall be governed by the seniority of the particular member of the Auxiliary Military Police. It has

already been demonstrated that all of these conditions of work are controlled by the Army and not by Respondent. It is irrelevant that the Army uses merit and ability rather than length of service as a basis for determining these things. What is relevant is that the Army controls them with respect to these Auxiliary Military Police and Respondent could not bargain with respect to them because it would be powerless to carry into effect any bargain which it made.

Article VII, of Board's Exhibit 102 (*Atkins*, R. 301), provides that the management of the plant shall be vested exclusively in the Company, a proposition which surely is not subject to bargaining with a Union. It further provides that the right to hire, suspend, discharge, or transfer, and the right to lay off employees for lack of work or other legitimate reasons is vested in Respondent. This is essentially a repetition of other provisions in the proposed Collective Bargaining Agreement. With reference to those other provisions it has been demonstrated that it is the Army and not the Respondent which has control over these matters, and that, therefore, Respondent can make no effective bargain with respect to them.

Article VIII (*Atkins*, R. 301), entitled "War Department Regulations," justifies quotation verbatim in the Footnote.* It provides that during the war the Collective

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*"Article VIII—War Department Regulations.

It is understood that for the duration of the war this Agreement is in all respects subject to the provisions of the Directives of the War Department concerning Military Organizations of the Plant Guard Forces (WD Directive, July 2, 1942, Ag 231.43; SOS Circular—, 1942; and any amendments thereto), and that nothing contained in this Agreement shall be construed in any way to interfere with the organization, efficiency, training, and control by the War Department of the Company Guard Force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employee in such Auxiliary Military Police." (Board's Ex. 102, *Atkins*, R. 301.)

Bargaining Agreement is subject to War Department directives, that the Agreement shall not interfere with the organization, efficiency, training and control by the War Department of the Auxiliary Military Police nor abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon such Auxiliary Military Police.

It has been demonstrated that all of the subjects purported to be covered by the proposed Collective Bargaining Agreement are either within the control of the War Department and not of Respondent, or are covered by conditions and regulations imposed by the War Department upon Respondent and the Auxiliary Military Police. The effect therefore of Article VIII is to eliminate the purported effect of the rest of the proposed Collective Bargaining Agreement, and to establish by the terms of that Agreement, what was already so as a matter of law and economic fact, that there could be no collective bargaining between Respondent and the Auxiliary Military Police.

This provision in Article VIII has been argued by the Board as freeing the Collective Bargaining Agreement from any conflict with the powers of the Army and the duties of the Auxiliary Military Police to the Army. This it may do, but in so doing it plainly labels the proposed Agreement "empty."

Article IX, of Board's Exhibit 102 (*Atkins*, R. 301-302), deals with the circumstances under which Auxiliary Military Police are entitled to leaves of absence. Respondent could not grant to a member of the Auxiliary Military Police permission to suspend for a time the performance of the duties which he undertook as such a member. This comment applies with equal force to Article IX (*Atkins*, R. 302-303), dealing with the subject of vacations.

Article X (*Atkins*, R. 302) relates simply to the duration of the proposed Agreement.

The proposed Collective Bargaining Agreement has two Supplements which are also reprinted verbatim as part of Board's Exhibit 102 beginning on page 303 of the *Atkins* Record. Supplement No. 1 deals with the subject of hours, and purports to limit the hours which a member of the Auxiliary Military Police can be on duty, to define the shifts, and to provide additional pay for time in excess of the prescribed hours. The mission of the Auxiliary Military Police is defined by the appropriate War Department Regulations to be "to serve with the Army." (Resp. Ex. 4, *Atkins*, R. 106.) The plant guard identification card issued to each member of the Auxiliary Military Police identifies that the particular member "has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States." (Resp. Ex. 3, *Atkins*, R. 104.) There surely can be no bargaining with respect to the hours or times at which those enrolled for service with the Army would perform that service. The Regulations provide, among other things, that such military service shall include "protection from air raid; fifth column activity; paratroop attack or invasion"; and that Auxiliary Military Police must wear certain insignia in order that they "will be recognized as legitimate troops and not deemed irregulars or guerrillas." (Resp. Ex. 4, *Atkins*, R. 106 and 110.) Under Supplement No. 1 to the proposed Collective Bargaining Agreement if the Auxiliary Military Police were called upon "as legitimate troops" to repulse "paratroop attack or invasion" they would be paid a certain rate during a regular shift, but at a rate increased to one and one-half times the regular rate if the battle extended beyond eight hours, or if it fell upon one of six named holidays, or if it fell upon the sixth day of service; and if it fell upon the seventh day of service these "legitimate troops" would be paid double time.

As a matter of both law and practice the hours and

shifts of these Auxiliary Military Police were set by the Army acting through the Chief of the Auxiliary Military Police. Thus it appears that Chief Johnston on his own authority rotated the shifts of the Auxiliary Military Police by a system which was contrary to the system established by Respondent for its own employees. (*Atkins*, R. 78-79.) His own hours were those of one "serving with the Army":

"Q. What are your hours of work?

A. My own hours?

Q. Yes.

A. I work whenever I think—I work whatever hours I think are advisable to work. They are very scattered and go all around the clock.

Q. You are paid overtime after eight hours in one day?

A. No, sir. I work on a straight salary basis. There is no cognizance at all taken of that when there are any extra hours.

Q. Do you on the average work more than eight hours a day?

A. Well—

Q. How much more?

A. Oh, on an average week after week, it might be ten hours—on an average week after week. Sometimes I work as high as sixteen and twenty and twenty-two, depending on the day and time and circumstances.

Q. But that is left to your own initiative as a military officer?

A. Yes, sir.

Q. Subject nevertheless to any orders you may get from higher authority?

A. Yes, sir." (*Atkins*, R. 79-80.)

Supplement No. 2 to the Board's Exhibit 102 deals with the subject of wages. The sole evidence on the rate of pay of the Auxiliary Military Police is contained in the testimony of Respondent's Personnel Director, Cyrus E. Wood, who testified that their rate was set pursuant to a

schedule filed by the Respondent with the Wage and Hour Division. Thus apparently the Army, acting with reference to the existing Wage Stabilization laws, orders and regulations, elected to leave the fixing of those rates to another branch of the Government, the War Labor Board and the Wage and Hour Division. The Army could have prescribed the wage rates, and the Respondent would have had to make payments at those rates, just as it paid the wage actually established "because the Government makes them pay." (*Atkins*, R. 82.)

It will not do to point out that the Wage Stabilization Law was temporary wartime regulation. Auxiliary Military Police were equally temporary establishments called forth by the exigencies of war. The fact is that wage stabilization machinery did exist when the Auxiliary Military Police were established, and the Army left the fixing of wages to that existing government machinery.

As has been said, the subjects covered by the contract proposed by the Union (Board's Ex. 102) are the same subjects which appear in almost every collective bargaining contract executed in this country. These things, wages, hours, seniority, grievance procedure, the union shop, no-strike, and no lockout clauses, discipline, discharge, layoff, recall to work, leaves of absence and vacations, are the subject matter of collective bargaining. These are the "rates of pay, wages, hours of employment, or other conditions of employment" with respect to which Respondent has been ordered to bargain with the Union by the Board. The purpose of the National Labor Relations Act, as stated in Section 1 of that statute, and as stated in the opinion of this Court in *National Labor Relations Board v. Hearst*, 322 U. S. 111, is to encourage collective bargaining and to protect the individual worker's freedom of organization and designation of representatives for bargaining in order to remedy the individual's inequality of bargaining power.

This Court has said in the *Hearst* case that these obstructions to interstate commerce, resulting from the refusal of employers to bargain collectively, and from the inequality of individual bargaining power, are the mischief which the statute is intended to correct; and that the end to be attained is the encouragement of such collective bargaining; and the remedying of such inequality, by protecting organization and representation. This Court said in the same decision that whether workers were "employees" within the meaning of that Act depended upon whether or not that mischief existed in the economic facts surrounding the relationship of those workers to the putative employer, and whether those ends could be attained by applying the machinery of the Act to that relationship.

It is clear that no obstructions to commerce can result from the refusal of Respondent to bargain collectively with these Auxiliary Military Police. Respondent cannot in law or in economic fact bargain with the Auxiliary Military Police either individually or collectively in respect to rates of pay, wages, hours of employment, or other conditions of employment. These subjects are not within the power of Respondent to change or affect. It could not set them unilaterally or by individual bargaining; it could not set them by collective bargaining. This being so, no inequality of bargaining power of the individual worker could cause such obstructions. These terms and conditions of employment were, in fact, set unilaterally by the Army through its representatives. It might be found that they were set by individual bargaining between the Army and the particular Auxiliary Military Policeman. But in any case they were not set by individual bargaining between the Auxiliary Military Policeman and the Respondent, or unilaterally by Respondent, and, therefore, the purpose of the Act to substitute collective bargaining for individual bar-

gaining for private employers is not here possible of achievement.

For these reasons, applying the doctrine of the *Hearst* case, these Auxiliary Military Police cannot be employees of Respondent within the meaning of that term in the Act. Since the subjects of bargaining are controlled by the Government of the United States, and since the Act gives no rights to workers with respect to the United States, these workers cannot be employees under the Act with respect to any person.

Chief of Guards Johnston Acted as Agent of the Army, Not of Respondent.

The Record was clear that much of the control over the Auxiliary Military Police, particularly with respect to hours, pay, promotion, discipline, assignment to shifts, recommendations for discharge, and orders as to particular work to be done, was in the hands of the two Chiefs of Guards. One of these, Henry A. Johnston, testified (*Atkins*, R. 68-84) as a witness called by Respondent. The guard called as a witness by the Union, Walter C Gann (*Atkins*, R. 52-63) served under Chief Johnston. It may be assumed that the facts as to Johnston were true also as to Chief Gann, who was at the other plant. There was no evidence, and there has been no contention, to the contrary.

Since so many of the activities deemed important as evidence of whether these Auxiliary Military Police were "employees" were carried on by Johnston, it is vitally important to determine for whom Johnston was acting. Was he doing these things as a representative of Respondent, or as a representative of the Army?

In briefs filed at earlier stages of this proceeding the

Board has assumed, without explicit statement, that the Chief represented Respondent. From this assumption flowed many of the Board's errors. In the present Brief before this Court, the Board has finally argued the point, more, however, by assertion than by demonstration from the record.

An examination of the record makes it abundantly clear that the Chief of Guards was at all times acting at the direction of, and on behalf of, the Army. His acts, and his control over the Auxiliary Military Police, were the acts and control of the Army.

First, let it be clear that there has been no finding by the Board on this subject. The only reference to the Chief in the Board's Decision and Order was the following:

> "According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works 'very closely' and 'cooperates' with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty." (*Atkins*, R. 31.)

The facts as to the capacity in which the Chief acted can be found only in the evidence.

There is no dispute that Chief Johnston was himself a member of the Auxiliary Military Police. He applied for enrollment like anyone else at the Respondent's personnel office, and "was given to understand that then when I filled the application that it would not be effective without the approval of the United States Government." (*Atkins*, R. 68.) He was investigated by the Military Authorities (*Atkins*, R. 71) and not by Respondent, and was sworn in as a Military Policeman (*Atkins*, R. 69). The Army then issued to him a "Plant Guard Identification Card" (*Atkins*, R. 69) which appears in facsimile as Respondent's Exhibit 3 (*Atkins*, R. 104).

That Plant Guard Identification Card is reproduced on the opposite page.

He was required to sign an Agreement with the United States of America (Resp. Ex. 2, *Atkins*, R. 103-104), after which he was a representative of the Government in the plant:

> "A. Well, that exhibit there is signed by the guard, the member of the Auxiliary Military Police. He is not yet a member. He signed that agreement and oath with the United States and that in turn is immediately forwarded to the Continuous Security District Office and then this pass is issued upon receipt after thorough checking has been given. It's issued on that contract. When you receive this pass then you know that you have been *accepted by the Government as one of their representatives in the plant.*" (Emphasis supplied.) (*Atkins*, R. 70.)

He received a Certificate of Enrollment in the Auxiliary Military Police of the Army of the United States:

> "UNITED STATES OF AMERICA.
>
> Auxiliary Military Police.
>
> Army of the United States.
>
> Certificate of Enrollment.
>
> This is to Certify that Henry Adams Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of ..... for service with the Army of the United States at E. C. Atkins & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.

Respondent's Exhibit 3

Information on Reverse Side Certified as Correct

Signature of Company Official

Name and Title

UNITED STATES OF AMERICA
AUXILIARY MILITARY POLICE
ARMY OF THE UNITED STATES
PLANT GUARD IDENTIFICATION CARD

This is to Certify that Henry A. Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States at E.C.Atkins & Co., Indianapolis, Ind., and is subject to Military Law for the duration of the War or until official termination by the War Department of his services as an [illegible].

For the Commanding General, Fifth Service Command

Date 8-3-43

Serial No. 105-ATE-016

B. R. WETENHALL
Capt. C. M. P.
District Plant Guard Officer
Cont. Secty. Dist. Off. Cincinnati, O.

Property of War Department:—To Be Returned to This Office Upon Termination.

BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	COMPLEX	RACE
5-26-06	5'10½"	155	Blu	Brn	Fai	W

SCARS OR MARKS Rgt. Elbow, skin
[illegible] Lft. Caulifl. ear
wears glasses -or- [illegible]

Fingerprinted 8-24-42

U. S. Citizen by: Birth

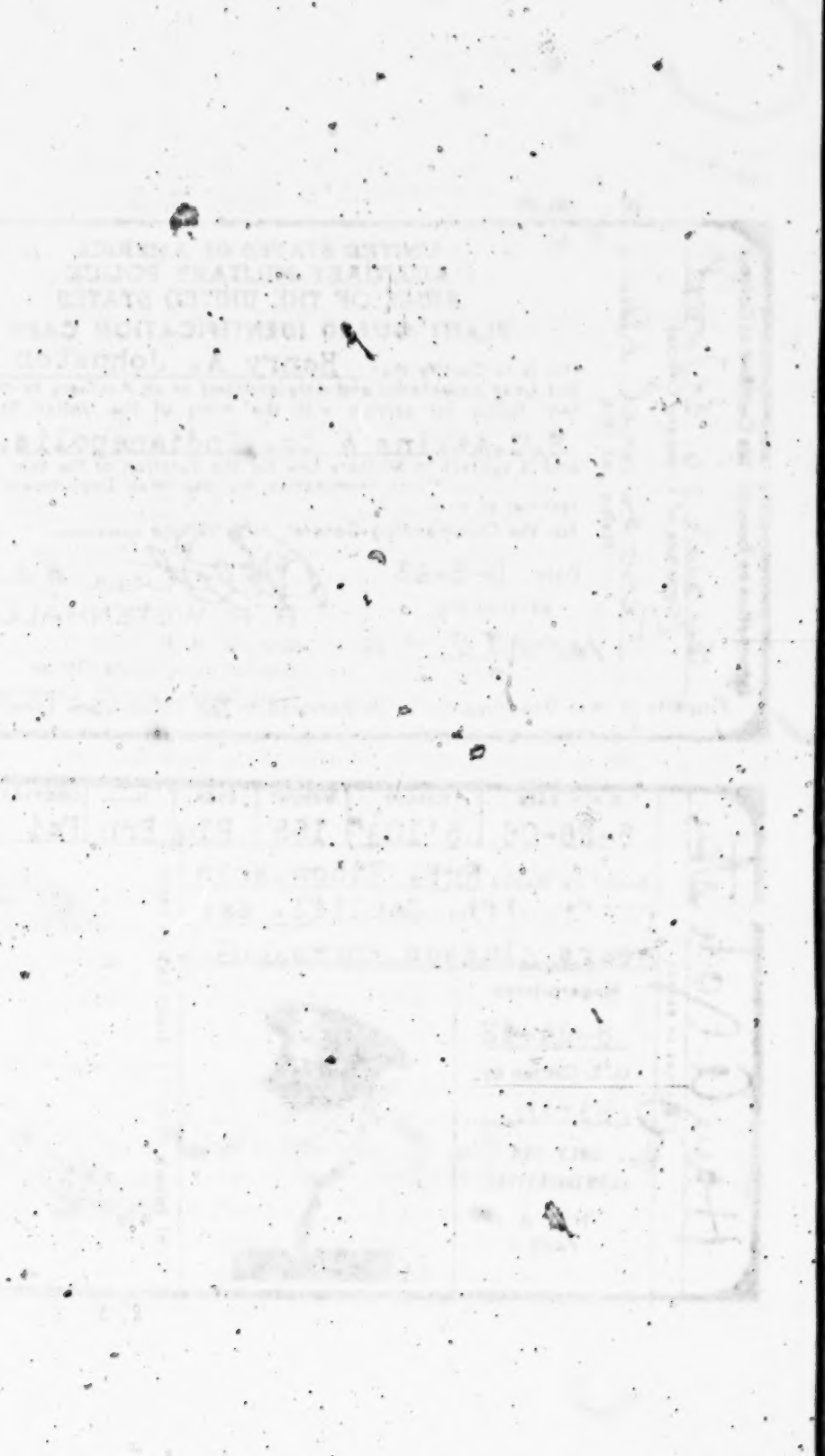
ONLY FOR IDENTIFICATION

NOT A PASS

RIGHT THUMB PRINT

LEFT THUMB PRINT

Henry A. Johnston
SIGNATURE OF BEARER



For the Commanding General, Fifth Service Command:

Dated 29 June 1943.

A. C. RASMUSSEN,
A. C. RASMUSSEN,
Lt. Col., Ord. Dept., Chief, Continuous Security District Office, Cincinnati, Ohio.

Official:

B. R. WETENHALL,
B. R. WETENHALL,
Capt., C.M.P., District Plant Guard Officer, Cont. Secty. Dist. Off., Cincinnati, O."

(Resp. Ex. 6, *Atkins*, R. 115-116.)

Chief Johnston received *all* of his orders from the Army, and none of them from Respondent. He received three "general orders."

"Q. Now, how do you receive the general orders for your duties, from what source?

A. General orders are received from Capt. Wetenhall of the Fifth Service Command, Cincinnati."

. . . . .

"Q. I now show you Employer's Exhibits Nos. 10, 11, and 12 and ask you what they are.

(Whereupon, the documents above referred to were marked for identification as 'Employer's Exhibits 10, 11, and 12.')

A. These are general orders from Capt. Wetenhall of the Fifth Service Command District Plant Guard Officer, who is over all the Auxiliary Military Police in this District. These three orders take up different subjects and they are to be followed." (*Atkins*, R. 73.)

He passed these orders on to this subordinates by having them photostated and enlarged four times (*Atkins*, R. 73).

The Chief of Guards was instructed to enforce orders

by the Army. He reported all violations of orders to the Army, and not to Respondent:

> "Q. Referring to Employer's Exhibit No. 11, I call your attention to the third General Order 'to report all violations of orders I am instructed to enforce.'
>
> A. That's right.
>
> Q. To whom do you report such violations? What do you do under that order?
>
> A. I would report any violation, any serious violation, to Capt. Wetenhall of Cincinnati." (*Atkins*, R. 75.)

He took his orders from the Army and not from Respondent or Respondent's officials:

> "Q. And who instructs you to enforce orders?
>
> A. It would be the government.
>
> Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?
>
> A. Yes, naturally; I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.
>
> Q. You try to cooperate?
>
> A. I try to cooperate to the best of my ability and he does the same for me." (*Atkins*, R. 75.)

Note that the above was the testimony that Chief Johnston worked "very closely" and "cooperated" with Mr. Wood, which the Board found so significant that it quoted it in its findings. (*Atkins*, R. 31.) The inference is not, however, obvious. Does the Board feel that one who was a member of the Army would not "work very closely" and "cooperate" with the officials of a war contractor at whose plant he was stationed? Are antagonism and obstruction necessary incidents of absence of the employee relationship? The Seventh Circuit Court of Appeals gave a sufficient answer when it said: "We should think that the

exercise of ordinary common sense would require co-operation between the military and the management, but that fact certainly can form no basis for an inference that respondent exercised control." (*Atkins*, R. 358.)

The Chief of Guards repeated his testimony as to lack of subordination to Respondent's officials under cross-examination by counsel for the Union:

"Q. Suppose Mr. Atkins came out and gave you an order. Would you obey that?

A. I never got an order.

Q. If you did, would you obey that order?

A. Well, I wouldn't consider it an order, in the first place. If I could oblige him in any way, without violating federal orders, I would do my best to co-operate with him, but I wouldn't have an order from him in the first place." (*Atkins*, R. 82.)

Chief Johnston was given weekly instruction by the Army, as were the other Auxiliary Military Police:

"Q. Will you now kindly tell us a little bit more about the kind of instruction which you and your men under your command have received from the Military Police and where that instruction was imparted?

A. Once a week on a Monday at the Ipaco on 16th and Alabama Street, we get one hour of instruction at the hands of the United States Army Corps of Military Police. That instruction is taught by a second lieutenant of the Military Police, under the direction of Capt. Wetenhall and his superior, Col. Rasmussen of the Continuous Superior District and subjects taken up are Military Police subjects only and attendant subjects. For instance, we have had a lot of instruction on judo, which is the art of self-defense. We have had instruction on the use of clubs and fists. We have had guiding law of instruction on pistol marksmanship and the general handling and care of them. We have had instruction on military courtesy by training films, methods of arrest by training films, and of disarmament of persons by training films, which are the property of the army and borrowed from the fort at Ft.

Harrison in the state here and returned by the lieutenant. They used sighting bars which are the property of Ft. Harrison showing the men how to sight their pieces (hold revolvers) for accuracy, and also there are other subjects such as fire control and prevention. That will give you a general idea. Some of the other subjects I can't recall just now. All Military Police subjects, every one of them. We have also had close order drill, regular army close order drill on the floor, administered by the lieutenant and his assistants in which we all took part." (*Atkins*, R. 79.)

Chief Johnston felt that his obligations were to the Army, and not to Respondent:

"Q. What would you do if you found Mr. Wood tampering with machinery or personnel or committing sabotage?

A. Well, in a case like that, I would just turn him in, like anybody else. I would arrest him and turn him in because I am sworn to do that. I have sworn an oath.

Q. Would you do the same with the president of the company?

A. Yes, sir; I would.

Q. And you own no responsibility to the president or any director of the company which would make you violate your oath to the Military?

A. No, sir; there is no reason for that." (*Atkins*, R. 80-81.)

Johnston received all his instructions, and made all of his reports, orally and by correspondence with Captain Wetenhall and Lieutenant Scanlon of the Army. In addition to the testimony already quoted herein, further testimony by Johnston on that subject appears in the footnote[7].

[7] "Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

Chief Johnston clearly manifested his understanding that he was not a representative of Respondent, but that he was a representative of the Army. Thus in speaking of discharges he said:

"A. The Military discharges him from the Auxili-

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging." (*Atkins*, R. 81.)

"Q. In connection with your administrative duties, do you carry on any correspondence with Mr. Wood or any officials of the plant?

A. No, sir.

Q. Do you carry on any correspondence with the Cincinnati office of the Military?

A. Yes, sir.

Q. With Captain Wetenhall?

A. Wetenhall's office.

Q. Do you have before you there the file of that correspondence?

A. Yes, sir; I think it is here.

Q. And that file is about one inch thick now?

A. Yes, sir.

Q. And contains onion skin carbon copies of your letters to Wetenhall and original letters from Wetenhall to you?

A. That's right.

Q. About how often do you write him affecting your duties, responsibilities, and requests for instructions from him?

A. On an average probably of twice a week, is all.

Q. You ask him both for general orders and for specific instructions?

A. Yes; or I might on a small case instead of writing Capt. Wetenhall, I might talk it over with his assistant, Lt. Scanlon in the City of Indianapolis, who lives here.

Q. That wouldn't require correspondence?

A. No.

Q. You could conduct by telephone, too?

A. Yes.

* * * * *

Q. If a man is drunk on duty have you the right to discharge that man?

A. I couldn't discharge him legally; no sir.

Q. Could you suspend him?

A. I would merely suspend him from duty as of the minute I saw him in that condition.

Q. What would be your next step?

A. To sit down and write Capt. Wetenhall a letter and I would recommend his discharge from the Military Police." (*Atkins*, R. 83-84.)

ary Military Police. Now there is one thing that should be said there. He can be relieved of his duty temporarily by myself *or* by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty; he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company." (Emphasis supplied.) (*Atkins*, R. 72.)

And he felt that his subordinates in the Auxiliary Military Police were required to obey his orders, as coming from a representative of the Army, and not those of representatives of Atkins:

"Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?

A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—

Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

A. They would—that would be their orders—to follow mine; yes, sir." (*Atkins*, R. 78.)

The Chief of Guards had ample reason from the Army itself to believe himself a representative of the Army and not of Respondent. The War Department's Plant Protection Data Binder, Section V, Letter 1, Dated June 7, 1943 (Resp.'s Ex. 4) states in paragraph 36:

"*The Auxiliary Military Police are agents of the Federal Government* and will not be subject to any state or municipal requirement which conflicts with their war time duties." (Emphasis supplied.) (*Atkins*, R. 111.)

The foregoing examination of the evidence shows clearly that the Chief of Guards was acting for, and received his powers from, the Army. He could not have been acting

for Respondent. For one thing, he obviously did not intend to act on behalf of Respondent; to represent Respondent, or to exercise any powers derived from Respondent. To hold that he was Respondent's representative would be to make him such completely, unwillingly and unknowingly.

For another thing, he received no orders, delegations or manifestations of authority from Respondent. He did receive such orders from the Army, reported his actions and decisions to Captain Wetenhall and Lieutenant Scanlon, and sought instructions from them.[8] In its present Brief the Board attempts to explain the complete lack of such consultation with Respondent by speaking of "the plenary authority which respondent Atkins vested in the chief guard." There is no evidence whatever of such authority being delegated. The illustrations which the Board gives concern Chief Johnston's final authority to promote guards to the rank of lieutenant, and to establish a system of rotating shifts. If these things had been subject to control by Respondent, which had a personnel department handling relations with over 1200 employees, it is incredible that there would be such "plenary authority" in Chief Johnston. His close contact with his Army superiors and his lack of control by Respondent demonstrate anew the obvious fact that he was acting for the Army as its representative, and was not the agent of Respondent.

Respondent's Personnel Director, Cyrus E. Wood, also testified that Respondent could give no orders to the Auxiliary Military Police. He had no control over Chief John-

[8] "Q. About how often do you write him (Captain Wetenhall) affecting your duties, responsibilities, and requests for instructions from him?

A. On an average probably of twice a week, is all.

Q. You ask him both for general orders and for specific instructions?

A. Yes; or I might on a small case instead of writing Capt. Wetenhall, I might talk it over with his assistant, Lt. Scanlon in the City of Indianapolis, who lives here." (*Atkins*, R. 83.)

ston in matters of discipline, they being handled by Colonel Rasmussen of the Army.[9]

From all of the foregoing it is apparent that

(1) Chief Johnston believed he was acting for the Army and not for Respondent;

(2) Chief Johnston purported to exercise authority derived from the Army and did not purport or intend to exercise any authority derived from Respondent;

(3) Chief Johnston received orders and instructions from the Army, and received no orders or instructions from Respondent;

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[9] "Q. Is his (Chief Johnston's) testimony with respect to your being permitted to make recommendations but not being permitted to give orders respecting the duties of the Auxiliary Military Police correct?

A. It is correct.

Q. You have been able to work in cooperation with the Auxiliary Military Police?

A. We have; yes.

Q. Have you ever attempted to exercise any of the authority which you are prohibited from exercising by military orders over any of these sixty-four members of the Military Police?

A. Not to my knowledge.

Q. Or has any foreman or hiring officer or director of Atkins and Company attempted to exercise such a right?

A. No.

Q. Instructions have been promulgated, have they not, throughout the entire plant that the Military Police a the business and affairs of the military authorities?

A. That's correct. It is understood, sir." (*Atkins*, R. 89-90.)

• • • • •

"Q. What would you do, Mr. Witness, if one of the Auxiliary Military Police came to you and protested to any action of a disciplinary nature by Chief Johnston?

A. Report that to the proper authorities, in this case to Col. Rasmussen in Cincinnati. He is the man that my office deals with when necessary.

Q. You would take no jurisdiction yourself?

A. No; not without instructions from Col. Rasmussen.

Q. You do, whenever matters of discipline are taken up in your plant get confirmation of any instructions which Col. Rasmussen or Capt. Wetenhall sent to Chief Johnston or to Chief Haun, is that right?

A. That's right." (*Atkins*, R. 90.)

(4) Respondent did not believe it could give orders to Chief Johnston or intend to give such orders; and

(5) the Army said "The Auxiliary Military Police are agents of the Federal Government."

It is clear that the control exercised by Chief Johnston cannot be imputed to Respondent. The Board did not so find, and such a finding would not be supported by evidence.

IV.

The Board Erroneously Assumed That This Case Fell Into a Category Which the Board Had Prejudged.

The authority of the Board to find a person guilty of an unfair labor practice and issue an order against him rests upon the following provision of Section 10 (c) of the National Labor Relations Act:

> "If *upon all the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." (Emphasis supplied.)

It is, therefore, the duty of the Board to decide each case upon the evidence *in that case*. And it is the duty of the Circuit Court of Appeals to set aside the Board's order if the Board's order is not supported by its findings, or if its findings are not supported by the evidence *in that case*. (National Labor Relations Act, Section 10(e).)

It is submitted that the Board in this case never focused upon the facts of this case at all, but upon hearing

the words "militarized plant guards" assumed that the facts and issues were the same as in all other cases involving militarized plant guards. That was a category in the mind of the Board. It had a policy for cases in that category. It applied that policy to this case without ever hearing the facts and issues sufficiently distinctly to realize that this was not what the Board has called a "typical plant guard case." (Petition for Writs of Certiorari, Nos. 418, 419, p. 24.)

In the Board's Decision and Direction of Election (*Atkins*, R. 5-8) in the representation case, there were no findings of fact whatever on the relationship between these Auxiliary Military Police and this Respondent. The Board seemed unaware of the testimony actually taken in this case.[10]

The Trial Examiner, in the unfair labor practice case, simply quoted part of the same language the Board had used in the representation case. (*Atkins*, R. 35.)

The Board itself, in the unfair labor practice case, adopted that "finding" of the Trial Examiner, and added some other and more specific findings which, as the Circuit Court of Appeals found, have no support in the evidence. These findings lack support in the evidence largely because the Board was not looking at the evidence, but was prejudging the case because it was labelled "militarized plant guard" and was fitted into a category on which the

[10] All the Board said was "The Company agrees with the scope of the unit but contends that such a unit is not an appropriate one since plant guards, who are all auxiliaries of the military police, are not employees within the meaning of the Act. This contention has been advanced in other cases and has been found untenable. More recently, in the Dravo Corporation case, the Board fully discussed the question as to whether the militarization of guards alters the character of their employment, stating therein that the relationship of employer and employee still exists despite such militarization. No facts or arguments are presented here which would warrant departing from our prior decisions; accordingly, the Company's contention is rejected." (*Atkins*, R. 7.)

Board's mind was already closed. This is apparent from its statement of Respondent's contention:

> "The respondent contends that the guards involved in this proceeding *are no longer* the respondent's employees, but are employees of the United States of America by reason of *having become* civilian auxiliaries of the Military Police." (Emphasis supplied.) (*Atkins*, R. 31.)—

A foundation stone of Respondent's case has always been the fact that these guards were *never* its employees. They were not a guard force existing as employees of Respondent who were thereafter militarized. They were a force created by and at the direction of the Army. Respondent made this position plain in its Answer to the Board's Complaint[11] and urged it in its briefs and arguments. Apparently the Board was neither listening nor reading. The Board had classified the case, and decided it by classification, before the testimony was received.

At every stage of the proceeding since, the Board has asserted this position. It refers at every turn to some 135 other cases involving militarized plant guards, and

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[11] Respondent's Answer contained the following:

"13. The Respondent further alleges that the Respondent is not, and cannot be, an employer within the meaning of Section 2 of the National Labor Relations Act, or any of its subdivisions, with respect to the 'plant guards' referred to in the Complaint, because all of them were 'auxiliary military police' under the jurisdiction and control of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and because all such 'auxiliary military police' were in the Federal Military Service at all times alleged in the Complaint." (*Atkins*, R. 294.)

* * * *

"15. The Respondent further alleges that the relationship of employer and employee, with its various incidents, *has never existed* as between the Respondent and the plant guards referred to in the Complaint, and that consequently the relationship between the Respondent and such plant guards is not subject to the jurisdiction of the National Labor Relations Board under any of the provisions of the National Labor Relations Act." (Emphasis supplied.) (*Atkins*, R. 295.)

holds them to have foreclosed this case, although an examination of those cases shows them to be different, in facts and in issues, from the present case. Thus in the Board's Brief in the present case it says:

> "Shortly after the militarization program was instituted the National Labor Relations Board, in cases coming before it, recognized that militarized plant guards constituted a *generic employee-category*, and that the incidents of their employment, and their relation to the military did not vary materially from plant to plant." (Emphasis supplied.)

In a footnote at this point in its Brief, the Board again refers to its "collection of more than 135 cases." Because of the importance the Board attaches to these 135 cases, in which the Board has recognized militarized plant guards as a "generic employee-category" whose incidents of employment and relation to the military did not vary materially, it is worth examining the Board's contention with respect to them, and comparing them with the present case. Such examination will show that the case at bar does differ materially in its vital facts from the 135 cases, and that the principal issue in this case was not raised in them.

One of the principal arguments of the Board, both in the Circuit Court of Appeals and in this Court, has been based upon an alleged fixed policy of the Board with respect to collective bargaining by militarized plant guards. The Board says that it has given careful consideration to the problems involved respecting such militarized plant guards and has embodied the results of that consideration in this consistent body of 135 decisions, all holding that militarized plant guards are "employees" under the Act and are entitled to bargain collectively.

The Board is saying both that the Court should be guided by its administrative expertness represented by

these 135 decisions, and also that the Court should be reluctant to overturn a body of law so widely established.

The Board can make this argument only because it fails to appreciate the issue in the present case. The Board has, as it says in its Brief, "recognized that militarized plant guards constitute a *generic employee-category*, and that the incidents of their employment and their relation to the military did not vary materially from plant to plant." The Board, therefore, has assumed, without discrimination, that the present case fitted into that category of cases, and has assumed, without examining the facts of the present case, that the incidents of the employment of these guards and their relation to the military were the same as those in the 135 cases to which the Board adverts.

The Board has failed to realize that the Respondent has raised in the present case an issue which was never raised or considered by the Board in those other cases, and that this issue is firmly founded upon facts in the present case which did not exist in those other cases.

To appreciate this it is necessary to distinguish the contention of the respondents in those other cases from the contention which the Respondent is making in the case at bar. In the 135 cases the companies were not denying that, as a matter of common law, and in any ordinary sense, the guards were the "employees" of the companies. The employers rather were pointing to the language of Section 2(2) which defines "employer" to include any person acting in the interest of an employer. They argued that plant guards, like supervisory employees, acted in the interests of an employer and, therefore, were not subject to collective bargaining. Sometimes they stated that, because these guards were "employers" within Section 2(2), therefore they could not be "employees" within Section 2(3); while at other times they stated merely that those

who were acting in the interest of management were not proper subjects of collective bargaining within the purposes and policies of the Act. Those employers were trying to get plant guards within the rule to that effect which the Board adopted for supervisory employees in *Maryland Drydock Company*, 49 NLRB 733, but has since abandoned.

This is a very different argument from that which is made by Respondent. Respondent contends, and the testimony shows, that the Auxiliary Military Police at its plant were not its employees in any sense. It points out that there were none of the common law indicia of the employment relationship. It points out further that the economic facts, which were referred to in *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, as the test of the word "employee" under the Act, here plainly show that these Auxiliary Military Police were not employees of Respondent. Respondent particularly emphasizes that it had control over none of the ordinary subjects of collective bargaining and that, therefore, ordering collective bargaining with these Auxiliary Military Police would neither promote collective bargaining nor correct any supposed inequality of bargaining power.

This issue which Respondent has raised, and upon which the Circuit Court of Appeals for the Seventh Circuit refused to enforce the Board's Order, is not present in the 135 cases to which the Board adverts. Those cases, therefore, do not reflect any prior Board consideration of this issue, nor do they reflect any settled body of law founded upon the administrative expertness of the Board. Rather than having considered this issue the Board, in the early stages of the proceeding, was unable to focus its mind upon it sufficiently to recognize its existence.

This brief speaks of this issue as having been raised by Respondent. It was, of course, raised rather by the

plain facts contained in the record in this case. This case presents a fact situation which is utterly different from the fact situations presented by the 135 cases. It is the Board's preconception that this is a "generic employee-category" and that "the incidents of their employment and their relation to the military" were always the same, which has kept the Board from realizing the obvious differences in the facts in this case.

One primary difference between this case and the 135 is the fact that there was no plant guard force at Respondent's plant existing before militarization. In the 135 cases there was a plant guard force which obviously stood in a relationship which, at least at common law, was an employment relationship to the companies. In those cases the Army or the Navy superimposed the status of Auxiliary Military Police upon that existing relationship without disturbing it very much. The economic facts of the relationship continued the same. The activities carried on by the guards continued to be carried on on behalf of the plant owners. The plant owners in those cases, as the Board regularly found, continued to control hiring, firing, promotion, wage rates, discipline, seniority, and all of the other conditions of employment.

In the Respondent's situation the facts were utterly different. Respondent had no plant guard force. Respondent had a few watchmen who occupied "pensioners' jobs" and who did not perform the functions or exercise the powers which the Auxiliary Military Police exercised. This Auxiliary Military Police force was created as a new thing by, and at the direction of, the Army of the United States. The functions which it performed were different functions. It never established a relationship with Respondent giving Respondent control over any of the terms or conditions of employment. Rather all of

these terms and conditions of employment were substantially controlled by the Army. The actual operations of the Auxiliary Military Police were conducted on behalf of the Army and not on behalf of Respondent, and were directed by the Chief of Guards who acted solely for the Army and not for Respondent. This is amply demonstrated in Parts II and III of this brief.

The detailed and careful review of the facts contained in the first opinion of the Circuit Court of Appeals amply demonstrates this distinct fact situation which existed in none of the other 135 cases.

Typical of the 135 cases is *Matter of Dravo Corporation*, 52 N. L. R. B. 322, which was the case cited in the body of the Board's Decision and Direction of Election, and which the Board has selected for special mention out of the 135 cases at each subsequent stage of this proceeding. It is worth examining to show the wide difference, factually and in law, between the present case and the 135.

In *Matter of Dravo Corporation*, 52 N. L. R. B. 322, the guards were enrolled members of the Coast Guard Reserve. There was no evidence that the force was born of the war. They were hired and paid by the Company, which was reimbursed by the Navy for its expenditures. The Company set their wage rates subject to the approval of the Navy. They were subject to the Articles for the Government of the Navy, the general orders of the Supervisor of Shipbuilding of the Navy, and the discipline of the Coast Guard, but were "answerable to the Company for the proper discharge of their duties." They had no duty or responsibility for any misconduct observed beyond reporting it to a production foreman, or, if it did not require immediate attention, reporting it to the chief guard. They were attached to the Company's Safety Department. There was no finding as to who could pro-

mote, discharge, fix hours and shifts, and affect other conditions of employment.

The Dravo Corporation's contention was "that the plant-protection employees are a part of management" (52 N. L. R. B. 322 at 326); that they "perform managerial functions which are delegated to them by the Company's Board of Directors." (52 N. L. R. B. 322 at 326.) In this it was saying simply that the guards were supervisory employees. It also contended that they could not be represented by the same union that represented other employees. But it nowhere contended that the guards lacked all employment relationship to the Company because neither hired, paid, promoted, discharged, disciplined or directed by the Company. It could not make that contention, because those facts were not in the *Dravo* evidence.

Therefore the *Dravo* case is distinct on its facts from the case at bar, and the main issue in the case at bar was not in issue there. If the *Dravo* ca[illegible] is typical of those in which the Board discovered the "generic employee-category" of "militarized plant guard," the incidents of whose employment and whose relationship to the military did not vary materially from plant to plant, then it was obvious error to put the case at bar in that category.

The Company's contention in the *Dravo* case reflected the conflict in Board theory as illustrated by *Matter of The Maryland Drydock Company*, 49 N. L. R. B. 733, and *Matter of The Maryland Drydock Company*, 50 N. L. R. B. 363. In the First *Maryland Drydock* case the Board held that, although supervisory employees were "employees" as defined in Section 2(3) of the Act, it would not effectuate the purpose of the Act to certify them as collective bargaining units. In the Second *Maryland Drydock* case the attempt was made to reach the same result as to

plant-protection employees. The Board there rejected the contention that plant guards were supervisory.

In the *Dravo* case the Company was contending that its plant guards should be treated as supervisory employees under the First *Maryland Drydock* case. It nowhere contended that they were not employed by the Dravo Corporation, but only that they represented management. It admitted that they were employees, but contended that they were supervisory.

It is, therefore, submitted that the Board's Order in this case is invalid because it is not founded "upon all the testimony taken" in this case but upon an erroneous assumption that this case falls into a class of cases which are actually dissimilar. It is further submitted that the action of the Circuit Court of Appeals in setting aside the Board's Order does not conflict with a settled policy of the Board founded upon consideration in numerous other cases since those cases involve a different issue and the issue in the present case has not previously been considered by the Board.

V.

The Circuit Court of Appeals Properly Found That the Board's Findings of Fact Were Not Supported by Evidence.

1. The Scope of Judicial Review.

The scope of judicial review of Board orders is limited by the provision, in Section 10(e) of the Act, that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive."

This has been held by this Court to mean that the findings must be supported by "substantial evidence"; and

that "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, 229; *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299.

In *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, this Court said "The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion but to 'guarantee against arbitrary action by the Board.'" For this quotation this Court cited S. Rep. No. 573, 74th Cong. 1st Sess. p. 14.

In *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130, this Court said:

> "Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record."

2. The Circuit Court of Appeals Observed the Limitations Upon the Scope of Its Reviewing Powers.

The Board charges the Circuit Court of Appeals with disregarding these rules in reviewing the Board's findings of fact. It is submitted, rather, that the Court observed them scrupulously.

The Court began by stating the rule which was to be its guide, including in its statement the foregoing quotation from the *Hearst* case:

> "We are of the view, also, that the findings contained in its decision in the unfair labor practice case, if substantially supported, are sufficient to support its order. In studying this record for the purpose of

ascertaining if such support is present, we are not unmindful of the admonition so often repeated that a court is not permitted to weigh the evidence and substitute its judgment for that of the Board. As stated in the recent case of *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 130:

> 'Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record.'" (*Atkins*, R. 349.)

* * * * * *

"Therefore, we are of the view that the decision in the Hearst case requires rather than precludes a review of the facts in the instant case, with a view of ascertaining if they reasonably support the Board's order." (*Atkins*, R. 350.)

The Court then stated verbatim the Board's findings. It is important to remember that these are *all* of the Board's findings relative to whether the Auxiliary Military Police were employees of Respondent:

"The material findings upon which the Board's order must rest are:

> 'The record shows that the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; that their discharge is ordinarily initiated by the respondent; and that during their employment they are paid by the respondent, at rates set by the respondent, and not by the United States of America. According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works "very closely" and "coooperates" with the respondent's representatives. Moreover, Johnston admitted that the respondent could

temporarily suspend a guard from duty. Cyrus E. Wood, the respondent's personnel director, who corroborated Johnston's testimony as related above, referred to the guards at the plants involved as the respondent's employees, and further testified that the respondent makes the "necessary pay roll deductions" before paying them their wages.

"* * * It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards. It is clear, however, that the respondent still retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act.'" (*Atkins*, R. 354.)

The Court then listed the four elements contained in the Board's finding:

"It is important in this connection to note the test which the Board utilized as a basis for its finding of the existence of the employer-employe relationship. The test includes four incidents: (1) the guards were paid by respondent; (2) they were hired by respondent; (3) they could be discharged by respondent; and (4) the control exercised by respondent." (*Atkins*, R. 354.)

The Court then examined the evidence carefully as to each of these elements to see if it contained support for them:

(1) *The Board's finding that the guards were paid by Respondent.* With respect to this the Court's opinion contained the following:

"The incident most strongly emphasized is that they were paid by respondent. Undoubtedly, this is

the most important incident common to the employer-employe relationship. In the instant case, however, it is, when viewed in connection with the attending circumstances, largely minimized if not entirely obliterated. Payment of these guards by respondent, in fact their employment, was a requirement imposed by the government as a prerequisite to respondent's right to engage in the manufacture of war material. It had no option to pay or not pay; neither did it have any option to employ or not employ. Chief Johnston, when asked why the guards were paid by respondent when their orders were received from the military authorities, stated an incontrovertible fact: 'They pay because the government makes them pay.' It must be assumed, so we think, that respondent was reimbursed by the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards. In reality, under such circumstances, as bearing upon the employer-employe relationship, we are of the view that it makes no difference whether they were paid by respondent or by the government.

It is also well to keep in mind that this guard force was born of the exigencies of war. None of them (with the exception of the four original watchmen) had theretofore been employed at respondent's plant. They were employed at the command of the government and the purpose of their employment was, as stated in the President's proclamation, 'to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities,' or, as stated in the agreement which the plant guard was required to sign with the government, 'to protect war material, war premises, and war utilities against all enemies, foreign and domestic.' In 'Plant Protection Data Binder' dated June 7, 1943, the mission of a guard force is stated to be twofold: (a) 'to provide interior and exterior protection of the plant against sabotage and espionage and natural hazards,' and (b) 'to serve with the Army in providing the pro-

tection to the plant and its environs in emergency situations.' Again, it is stated in this Binder, 'The auxiliary military police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities.' It appears certain not only that they were employed at the command of the government but that the services rendered by them were for the benefit of the government and the war effort. Any benefit accruing to respondent from their services was purely incidental to the primary purpose of their employment. Reliance upon payment under such circumstances is to embrace form and to ignore the utilities of the situation." (*Atkins*, R. 354-355.)

(2) and (3) *The Board's finding that the guards are hired by the Respondent and that their discharge is ordinarily initiated by the Respondent.* With respect to these findings, which are inextricably intertwined in the evidence, the Court made the following analysis:

"The Board's finding that the guards 'are hired by the respondent; that their discharge is ordinarily initiated by the respondent' is deceptive and, we think, without substantial support. It is true, as the Board found, that the guards 'are interviewed for employment by the respondent.' This is done by respondent's personnel officer when the applicant is required to fill out an application blank. This service on the part of respondent is also required by the government. At the time the application for employment is made, the applicant is expressly told: 'It will not be effective without the approval of the United States government.' True, after the application form had been executed, it was the custom temporarily to assign the applicant to plant control work. In the meantime, he was required by the government to sign the agreement with it, as heretofore related. This agreement stated: 'The United States is approving the employment * * *.' Also, as heretofore sug-

gested, if he refused to sign this agreement, he never became a member of the military police and his dismissal was required within a reasonable time.

The application and agreement were then transmitted to the military authorities at Cincinnati and such authorities made an investigation as to the capacity, integrity and patriotism of the applicant. Such authorities had the entire responsibility of determining the applicant's fitness, even to the extent of his physical fitness. If he was accepted by the military authorities, the signed agreement with the government was returned to the applicant, together with a Plant Guard Identification Card executed by Captain Wetenhall, District Plant Guard Officer.

This card certifies: '..... has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States at ....., and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.' It is pertinent to note that this identification card which constitutes the guard's authority states in no uncertain terms that he has been enrolled 'for service with the Army of the United States at .....;' and, further, that he is subject 'to Military Law for the duration of the War or until the earlier official termination by the War Department.' Certainly this badge of authority contains not the slightest indication that the guard has been employed, hired or can be discharged by respondent.

The applicant is also furnished with the 'Certificate of Enrollment,' also signed by Captain Wetenhall. The phraseology of this certificate is the same as that of the identification card. There appears in

the record one of these certificates in its executed form.[1]

Upon receiving the documents just referred to, the applicant is inducted by taking the oath of allegiance to the United States and the military. This oath includes an obligation to be subject to the Articles of War. Any doubt as to when employment as a member of the military police commences is dispelled by a provision in guard order No. 3, which states: 'Service will begin with the date that the plant guard was inducted * * *.'

Plant Protection Data Binder dated June 7, 1943, provides:

> 'Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released by the War Department from his obligations. This will take place when competent military authority has approved of his dismissal or resignation or when he has been discharged without honor.'

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[1] (Court's footnote.)

UNITED STATES OF AMERICA

AUXILIARY MILITARY POLICE
ARMY OF THE UNITED STATES

Certificate of Enrollment

This is to certify that Henry Adams Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of ....., for service with the Army of the United States at E. C. Atkins & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.
For the Commanding General, Fifth Service Command:

Dated 29 June 1943.

A. C. RASMUSSEN.

Official:

B. R. WETENHALL,
Plant Guard Officer.

Again, it is provided in this same Binder:

'Basically the militarization of the plant guard forces does not change the existing systems of hiring, compensation, and dismissal except as stated in paragraph 25.'

Paragraph 25 provides:

'A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police.'

From what we have shown, we think it is conclusively established that the authority to hire and discharge was solely the prerogative of the military. True, respondent was charged by the government with receiving the application for employment and in making a recommendation. This is the sole support, if it can be characterized as such, found in this record for the Board's finding that respondent was authorized to hire. Nor do we find any support for the Board's finding that 'their discharge is ordinarily initiated by the respondent.' The most which can be inferred is that respondent was permitted to recommend for discharge the same as it was required to recommend for hiring.

In making this analysis of respondent's right to hire and discharge, we must note the testimony of the witness Gann, which the Board stresses. It follows:

'Q. Who hires the guard?

'A. The personnel manager and the Chief.

'Q. Who has the authority to discharge you?

'A. The personnel manager or the Chief, I would think, of E. C. Atkins and Co.'

These answers by the witness merely represented his opinion and, in addition, the 'Chief' referred to was Chief Johnston who, as will be shown, was entirely under the control of the military. Putting aside, however, such considerations, a reading of Gann's entire testimony shows conclusively that he was employed in the same manner as all other guards. This is illustrated by the following questions and answers:

> 'Q. From the 21st of January to the 27th of January you were an employee of E. C. Atkins and Company?
>
> 'A. Yes, sir.
>
> 'Q. They pay you whether you are their employee or whether you are a military policeman, but from January 27 you became a military policeman and were no longer an employee of E. C. Atkins and Company, as you had been up to January 27? Your status changed, did it not?
>
> 'A. That's right. I wasn't a member of the Auxiliary Military Police until I was inducted January 27.'

The most favorable possible inference which can be drawn from the record is that respondent's authority, if it had any, with reference to hire and discharge was narrowly limited; in fact, as we have stated, we think it had no right in such matters except that of making recommendations to the military authorities." (*Atkins*, R. 355-358.)

4. *The Board's finding as to the control exercised by Respondent.* Here the Court recognized the vagueness of the Board's finding, which was simply that Respondent "retains a sufficient residual measure of control," and found this unsupported by evidence of any control whatever:

> "This brings us to the matter of control. The Board's finding in this respect may be properly characterized as wholly impotent. It admitted that 'respondent may have surrendered to the military authorities many of the attributes of control which it would normally pos-

sess over its plant guards.' It found, however, that it retained 'a sufficient residual measure of control.' What was intended by this language is not explained. The findings are silent as to any act or conduct on the part of respondent which evidences any control. The oral testimony shows without any contradiction that all members of the plant guard at the Main Plant took their orders and instructions from Chief Johnston. (We assume that the members of the force at the Ordnance Plant likewise took their instructions from Chief Hann; at any rate, no question is raised but that the same situation existed at each plant.) The record shows with the same degree of certainty that Johnston took his instruction *in toto* from the military authorities. The only reference made by the Board in this respect was that Johnston 'works very closely and cooperates with respondent's representatives.' We should think that the exercise of ordinary common sense would require cooperation between the military and the management, but that fact certainly can form no basis for an inference that respondent exercised control. Especially is this so when the direct uncontradicted evidence is that all control was exercised by the Army. In this connection, it seems appropriate to relate certain portions of Johnston's testimony and we do so in a footnote.[1]

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[1] (Court's footnote.)

'Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?

'A. Yes; naturally, I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.

'Q. You try to cooperate?

'A. I try to cooperate to the best of my ability and he does the same for me.'

• • • • •

'Q. Now, how do you receive the general orders for your duties, from what source?

'A. General orders are received from Captain Wetenhall of the Fifth Service Command, Cincinnati.'

• • • • •

The witness Gann, who testified that he was acquainted with all the duties of a guard, did not mention a single instance in which any duty was performed under the direction of respondent. On the other hand, he conceded that all duties were performed under orders received from the military. True at one place in his testimony he was asked, 'What, in general, do guards do?' and answered, 'In general they guard the plant, supposed to obey all the general orders and specific orders which the company asks us to obey.' Later he testified, in complete harmony with the other witnesses, that by general orders he meant those issued by the government pertaining to the service generally, and by special orders he meant those issued by the government which applied especially to respondent's plant. Then he was asked, 'And when you said "company orders" you did not mean the E. C. Atkins Company, but the military company to which you belong? They are the lieutenants, the assistant chief, the chief, and then Lt. Scanlon and Capt. Wetenhall?' And he answered, 'Well, that's true.'

'Q. (Referring to violation of military orders.) To whom do you report such violations?

'A. I would report any violation, any serious violation, to Captain Wetenhall of Cincinnati.

'Q. And who instructs you to enforce orders?

'A. It would be the government.'

* * * * *

'Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?

'A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—

'Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

'A. They would—that would be their orders—to follow mine; yes, sir.

'Q. You would have the same reaction towards such request of cooperation as you would if you had a specific order or a general order to the contrary from one of these superiors, is that right?

'A. Yes, sir. In those orders, it says, "No conflicting interest." It means a little different thing there, but it means a lot besides. You would follow your Government orders first. They would have a much higher priority.'

That the military had control even to the minutest detail is shown by the testimony of Gann that special orders were received from the military as to the particular gate through which certain trucks should enter the plant. Also illustrative of this absolute control is the testimony of Johnston. In response to a question as to what he would do if he found Mr. Wood tampering with machinery or personnel, he answered:

'Well, in a case like that, I would just turn him in, like anybody else. I would arrest him and turn him in because I am sworn to do that. I have sworn an oath.

'Q. Would you do the same with the president of the company?

'A. Yes, sir; I would.

'Q. And you own no responsibility to the president or any director of the company which would make you violate your oath to the Military?

'A. No, sir; there is no reason for that.'

Johnston also identified three forms of passes which were issued to various employees, one for admission from the outside into the armor plate division, another for admission into the same division by an employee entering from another department, and another known as a gate pass, which permitted the entering and departure from a gate. No employee could enter a gate or a building until he had exhibited to a member of the guard the appropriate pass. Even an executive of the company could not enter a gate or go from one building to another without exhibiting his pass to a guard. These were military orders.

The statement in the Board's findings that respondent's personnel director 'referred to the guards at the plants involved as respondent's employees' is also without substance. It is based solely upon the following questions and answers:

'Q. How many of your employees at the main plant are plant guards or Auxiliary Military Police?

'A. Thirty-two.

'Q. When you say your employees, they are your employees only in the sense that you pay their wages, is that right?

'A. That is correct.

'Q. And you make the necessary pay roll deductions?

'A. That's right!'" (*Atkins*, R. 358-360.)

Having thus carefully and painstakingly examined the evidence for support for the Board's findings, the Court concluded that there was none:

"We think the conclusion is inescapable that the Board's findings based upon proof as to what actually happened is without substantial support. The proof shows without contradiction that respondent (1) paid the guards, but under the circumstances heretofore related, (2) had nothing to do with hiring and discharging other than making recommendations as to the former, and (3) exercised no control." (*Atkins*, R. 360.)

The Court then, to be sure that it had not omitted any evidence which might support the findings, went back over the record, examining again those points at which the Board, in its argument and brief to that Court, had claimed to detect support for its findings. Again, it found none. (*Atkins*, R. 360-364.)

In so doing, the Court pointed to the fact that the support the Board purported to have for its findings lay almost entirely in documents, and that in them the Board claimed authority was given to Respondent even if Respondent never exercised it:

"True, the Board intimates that respondent failed to exercise the authority which it had, and stresses certain provisions in the documentary evidence which perhaps lend some color to the suggestion." (*Atkins*, R. 360.)

> "The Board places strong reliance upon certain provisions contained in Circular No. 15 of the War Department, dated March 17, 1943. This document occupies twenty full pages of the Board's brief. A cursory reading of certain statements contained in this document seem to indicate that respondent had some measure of authority over members of the plant guard. Even if this be so, however, as we have heretofore shown, all authority and control was taken over by the Army and none was exercised by respondent. Furthermore, we are of the view that this document when considered as a whole, and especially when considered in connection with other documents to which we have referred, leaves little room for the contention that respondent had the right but failed to exercise control." (*Atkins*, R. 362.)

Although the Circuit Court of Appeals took judicial notice[12] of Circular No. 15 (Board's Brief, Appendix B) which was never part of the record, the Court saw that it did not shed light upon those facts which the Board found in its decision.

3. Circular No. 15 Was Not Available to Support the Board's Finding.

It is submitted that this Circular No. 15 is not available, as support for the Board's findings, to make them conclusive within the provision in Section 10(e) of the Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." That would violate the requirement in Section 10(e) of the Act that the Board's findings must be made "upon all the testimony taken."

This is not to argue for a narrow construction of the words "evidence" and "testimony." Obviously they in-

[12] Respondent contended, and still contends, that this Circular No. 15, which was neither published in the Federal Register nor signed by the Secretary of War, was not such a document of which the Court could take judicial notice.

clude documents as well as oral statements of witnesses; obviously also they include those facts of which a tribunal can take judicial notice.

But the minimum requirement is that the Board's findings be supported by evidence (in its broad sense) *known to the Board*. It is submitted also that while the proceeding is before the Board, the evidence upon which its findings are to be based must be made known to Respondent in order that Respondent may have an opportunity to present rebutting testimony, and to argue the effect and significance of such Board evidence.

In the present case, not even the minimum requirement was met. Circular No. 15 never became, and still is not, part of the record. It was not mentioned at any stage of the proceedings before the Board. It is not cited in the Board's Decision and Direction of Election (*Atkins*, R. 5-8), in the Trial Examiner's Intermediate Report (*Atkins*, R. 33-42), or in the Board's Decision and Order. (*Atkins*, R. 30-33.) It was not mentioned in the oral argument before two members of the Board. (*Atkins*, R. 324-336.) It appeared first as an "Addendum" at pages 20-44 of the Board's Brief in the Circuit Court of Appeals.

It is apparent from these circumstances that this Circular No. 15 was not known to Respondent, the Union, the Auxiliary Military Police, or the Board until the Board was preparing its case for the Circuit Court of Appeals. It could not have been part of the evidence upon which the Board made its finding, because it was not then known to the Board. It therefore cannot be cited as evidence supporting the finding of the Board and making it conclusive.

The Senate Committee on Education and Labor stated that the judicial review provided in the Act was to provide "a complete guarantee against arbitrary action by

the Board."[13] This Court quoted that statement as showing the purpose which the Circuit Court of Appeals was to perform in *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376. Findings of fact which are arrived at by the Board without support in the evidence are arbitrary. The making of such findings is equally an arbitrary action by the Board if they could be supported by judicially noticeable evidence which comes later to the Board's attention.

The power of the Board to make conclusive findings of fact is one necessary to the administrative process. It is also one which by misuse could become an instrument of arbitrary and despotic action. Such misuse is present when the Board makes findings without support in the record. The misuse cannot be eliminated by any search the Board may subsequently make for judicially noticeable evidence outside the record.

The Circuit Court of Appeals should not have considered Circular No. 15 in looking for support for the Board's findings. It did consider that Circular, and discovered that the findings were not supported even there.

4. The Circuit Court of Appeals Erred in Taking Judicial Notice of Circular No. 15.

As has been said, Circular No. 15, issued by Headquarters, Army Service Forces, War Department, Washington, and dated March 17, 1943 (Board's Brief, Appendix B) is not contained anywhere in the record and appeared in these proceedings for the first time in an "Addendum" to the Board's Brief in the Circuit Court of Appeals. Respondent contended that it could not be considered in looking for evidence to support the Board's order because it was not part of the record. The Circuit Court of

[13] S. Rep. No. 573, 74th Cong. 1st. Sess. p. 14.

Appeals rejected this contention and took judicial notice of this Circular No. 15. The Circuit Court of Appeals said:

> "Circular No. 15 has been printed by the Board as a supplement to its brief. It was not introduced in evidence, and respondent contends that it cannot be considered as proof in support of the Board's order. It is a public document of which, so we think, a court may take judicial notice. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483." (*Atkins*, R. 353, Footnote.)

It is submitted that the Court could not take judicial notice of Circular No. 15 and that therefore it could not be considered in determining whether the Board's findings of fact were supported by evidence.

This question was argued by counsel for the Board and for Respondent in Motions and Memoranda filed with the Circuit Court of Appeals before the case was briefed, as well as in the briefs before that Court. The Board stated its position as follows:

> "It is well settled that such regulations, like regulations of executive officers of the Government issued in the exercise of their statutory functions, have the force and effect of law. *United States* v. *Grimaud*, 220 U. S. 506, 520-523; *United States* v. *Morehead*, 243 U. S. 607, 613-616; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 488. Having such effect, the regulations in question, even though not formally introduced into evidence, may be judicially noticed by this Court just as decisions of the courts and administrative agencies and acts of Congress are judicially noticed and considered. *Caha* v. *United States*, 152 U. S. 211, 221-222; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 488; *Givens* v. *Zerbst*, 255 U. S. 11, 18." (*Atkins*, R. 342.)

In this the Board states the rule of judicial notice too broadly. The six cases cited by the Board are all cases

in which a statute expressly directed the head of an Executive Department, or Administrative Department, such as the Secretary of War, personally, or the Interstate Commerce Commission, to promulgate rules and regulations in the first instance, or to approve them as promulgated after they have been prepared by a subordinate officer or bureau. In not one of the cases is a regulation, not promulgated under the hand of the head of the Executive Department, or by order of the Administrative Tribunal concerned, given statutory effect or judicially noticed.

Later the Board added the further citation of *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481, 483-484. This case, however, was of the same kind. It did hold that certain War Department regulations had the force of law, but they were regulations promulgated by the Secretary of War, himself, under a Congressional enactment authorizing him to do so. This appears from that case as follows: "On July 25, 1895, the Secretary of War, under authority of Congressional enactments promulgated regulations providing for the establishment of post exchanges." (316 U. S. 483-484.)

Circular No. 15 was signed by the Chief of Staff of the General Staff Corps, who recited that it was done by command of Lieutenant General Somervell, who was then Head of Army Service Forces. Circular No. 15 was not issued by the Secretary of War. There is no statute or executive order authorizing the Chief of Staff of the General Staff Corps, or for that matter the Head of Army Service Forces, to issue any such regulations. On the contrary in Executive Order No. 8972, dated December 12, 1941, the President said: "I hereby authorize and direct the *Secretary of War*, whenever he deems such action to be necessary or desirable, * * * to establish and maintain military guards and patrols * * *." (Emphasis supplied. *Atkins*, R. 345.)

Thus the rule is that regulations have the force of law, and are to be judicially noticed, only if they are issued by the officer of the Government expressly authorized to issue them by statute or Executive Order. The multitude of directives, opinions and rules which are put out by subordinates in the Government do not have such effect.

It would be grossly unfair to give such directives the force of law and to take judicial notice of them since the persons affected by them do not have an opportunity to learn of their existence or their content. These are not regulations which have been published in the Federal Register. Apparently they do not come within the provision of the Federal Register Act (49 Stat. 501, 44 U. S. C. 305), requiring publication of "such documents or classes of documents as the President may determine from time to time have general applicability and legal effect."

It is submitted that the Circuit Court of Appeals could not properly take judicial notice of Circular No. 15 issued by Army Service Forces and that Circular No. 15 cannot be used in a search for evidence to support the Board's findings of fact.

VI.

The Order of the Board Is Too Broad in Its Scope.

Even if it were held that the Auxiliary Military Police were employees of Respondent within the meaning of the Act, the order of the Board (*Atkins*, R. 32-33) should not be enforced because it is too broad in its scope.

In the first place, the order requires Respondent to bargain collectively with the Union as the representative of the plant guards "in respect to rates of pay, wages, hours of employment, and other conditions of employ-

ment." Even the Board in its final findings in its Decision and Order (*Atkins*, R. 32) has conceded that Respondent surrendered to the Army many of the attributes of control over the plant guards; and therefore many normal subjects of collective bargaining would be beyond the bargaining power of Respondent. The analysis contained in Part II of this Brief, even if not accepted in every particular, surely demonstrates that as to some subjects Respondent could not possibly have bargained.

It is therefore submitted that both the order to cease and desist and the order to take affirmative action to bargain "in respect to rates of pay, wages, hours of employment, and other conditions of employment" are far too broad to be enforced. The Board has given no indication as to which items of collective bargaining, as set forth in the Union's proposed contract (Board's Ex. 102, *Atkins*, R. 297-304), are within the "residual measure of control over the terms and conditions of employment of the guards." Obviously the order could not be enforced as written and the Board's request for its enforcement should be completely denied.

In the second place, paragraph 1(b) of the order requires Respondent to cease and desist from

> "Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." (*Atkins*, R. 32.)

This language is not limited to plant guards, but is, in its terms, broad enough to refer to any employees of Respondent. It is plain in the record that Respondent's re-

lations with its productions employees have been uniformly harmonious. Respondent has bargained collectively with Sawsmiths Local Union No. 18,548, AFL, for forty years, and has a closed shop contract with that union. Respondent had, at the time of the hearing, already bargained with the United Steelworkers of America, C.I.O., with respect to the rest of its production employees, for seven years, and had a union shop contract with that union. Respondent had never been the subject of a charge of an unfair labor practice at the instance of either.

There is no suggestion in the record that Respondent has been guilty of any act or conduct which might be construed to be an unfair labor practice other than the simple refusal to bargain with the Union as the representative of the employees. From the beginning Respondent made it clear that this refusal was based solely upon Respondent's belief that these Auxiliary Military Police were not its "employees." (Board's Ex. 103, *Atkins*, R. 304-305.)

It is clear from these facts that if the Auxiliary Military Police were held to be Respondent's employees, and an order were entered, it should not apply to the production employees with whose unions the Respondent has dealt so long and so harmoniously. It is submitted further that the order should do no more than to require bargaining, and that there is no occasion for paragraph 1(b) of the proposed order at all.

This is in accordance with the principles laid down by this Court in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, at 436-437:

> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the

indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. See *e.g., H. J. Heinz Co.* v. *National Labor Relations Bd., No. 73,* decided January 6, 1941.

Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. But as the Court has held in the case of the Federal Trade Commission, see *Federal Trade Commission* v. *Beech-Nut Packing Co., supra* (257 U. S. 455, 66 L. ed. 314, 42 S. Ct. 150, 19 ALR 882), an order not so related should be appropriately restricted on review. The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. See *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 308, 309, 41 L. ed. 1007, 1016, 1017, 17 S. Ct. 540; *Standard Oil Co.* v. *United States*, 221 U. S. 77, 55 L. ed. 619, 652, 31 S. Ct. 502, 34 LRA (NS) 834, Ann. Cas. 1912D 734; *Texas & N.O.R. Co.* v. *Brotherhood of R. & S.S. Clerks*, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427; *Local 167, I.B.T.* v. *United States*, 291 U. S. 293, 78 L. ed. 804, 54 S. Ct. 396; *Virginian R. Co.* v. *System Federation*, R.E.D. 300 U. S. 515, 541, 543, 544, 81 L. ed. 789, 796, 797, 798, 57 S. Ct. 592. We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed

or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here." (312 U. S. 436-437.)

VII.

Enforcement of the Board's Order Was Properly Denied as Inimical to the Public Welfare.

If it were held, contrary to the principal holding of the Circuit Court of Appeals, that the Auxiliary Military Police were "employees" within the meaning of the Act, nevertheless the Board's Order should be denied enforcement because it conflicted with the prosecution of the War, a National objective more important than those set forth in the National Labor Relations Act. The situation presented is similar to that presented in *Southern Steamship Company* v. *National Labor Relations Board*, 316 U. S. 31, where this Court said:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." (316 U. S. 31 at 47.)

It has already been demonstrated herein that the Army retained control over the subjects which are ordinarily covered by collective bargaining. The Army did so as a necessary step in the prosecution of the war. In Executive Order 8972, dated December 12, 1941, in which the President directed the Secretary of War "to establish and

maintain military guards," the President stated that he acted by virtue of the authority vested in him as Commander-in-Chief. (*Atkins*, R. 344-345.)

It is to be assumed that the Army's retention of control over the terms and condition of employment was deemed by the Army necessary to the performance of the mission of these Auxiliary Military Police. In view of the fact that the Army enrolled these guards "to serve with the Army" for "protection from air raid; Fifth Column activity; paratroop attack or invasion" (Resp. Ex. 4, *Atkins*, R. 106) and required them to wear insignia so that "members serving with the Army will be recognized as legitimate troops" (Resp. Ex. 4, *Atkins*, R. 110), it is not surprising that the Army would not want their hiring, discharge, promotion, hours, shifts, discipline, and other terms and conditions of employment out of Army control.

The Board's order would have required that that control be taken from the Army and that those terms and conditions be determined rather by Respondent and the Union.

The Board sought the removal of imagined obstructions to interstate commerce so single-mindedly that it placed obstructions in the path of the prosecution of the War. The Circuit Court of Appeals rightly refused to assist it.

Conclusion.

For the foregoing reasons it is submitted that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be affirmed.

KURT F. PANTZER,
FREDERIC D. ANDERSON,
LEWIS C. BOSE,
Attorneys for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.